No. 2838

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington,

Plaintiff in Error,

v.

W. H. PARSONS and JANE DOE PARSONS, his wife,
FALCON JOSLIN and JANE DOE JOSLIN, his wife,
JOHN SCHRAM and JANE DOE SCHRAM, his wife,
E. L. WEBSTER AND JANE DOE WEBSTER, his wife,
J. W. CLISE and JANE DOE CLISE, his wife,
F. E. BARBOUR and JANE DOE BARBOUR, his wife,
and WASHINGTON SECURITIES COMPANY, a corporation,

Defendants in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

## BRIEF OF PLAINTIFF IN ERROR



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## STATEMENT OF THE CASE

This is an action at law, on a tort, for compensatory and exemplary damages given by section 7 of the Sherman Anti-Trust Act. The complaint al-

leges that the defendants and others violated section 3 of that Act by contracting, combining and conspiring to limit, restrict and suppress competition in the banking business in a territory, to-wit, at Fairbanks, Alaska, and the surrounding region; that the plan of the defendants and their fellow-conspirators was executed and thereby one of the banks at Fairbanks was ruined and destroyed. The receiver of that bank sues for the damage thus inflicted.

We will briefly summarize the allegations of the complaint. Three banking concerns did a banking business at Fairbanks; one, a partnership which was succeeded by a corporation organized under the laws of Nevada; this corporation the complaint calls the Nevada Company; another, a national bank called the First National Bank of Fairbanks; and a third, a corporation organized under the laws of the State of Washington, called in the complaint the Washington Company (it is the receiver of the Washington Company who is plaintiff in this action). The defendants (excepting the women) were the stockholders, and some of them were the directors, of the Washington Company; the women named are wives of stockholders of the latter company. Various contracts are set forth in the first fourteen paragraphs of the complaint by way of inducement, in order to show the system or plan adopted and pursued by the said banks in earlier years to suppress competition among them, and to exhibit the motives and purposes actuating the defendants and their fellow-conspirators in the transaction which forms

the gist of this action, namely, the transaction of 1909 which destroyed the Washington Company, and which is set out in paragraph XV and succeeding paragraphs of the complaint. To this latter transaction the Washington Company was not a party; on the contrary, as the allegations of the complaint disclose, the Washington Company, as a corporation, was the deliberately chosen victim thereof, notwithstanding that its stockholders—as individuals, not as stockholders—profited enormously thereby. That transaction is described as a design, fully carried out, on the part of the defendants and the directorate of the Nevada Company, to eliminate the Washington Company from the banking business with the purpose of limiting, restricting and suppressing competition and of concentrating said business in the hands of the Nevada Company. The said design was carried out by three devices: (1) The stockholders of the Washington Company, in consideration of $140,000.00 "bonus" for their stock (really their share, paid in advance, of the anticipated and expected profits of the transaction), transferred all the capital stock of the Washington Company, and all its assets, to the Nevada Company by means of a so-called sale of said stock,—a null and void sale and purchase because wholly *ultra vires* of the Nevada Company; (2) the operating heads of the Washington Company agreed with the Nevada Company not to start another competing bank; (3) a consolidation of the Washington Company and the Nevada Company was falsely

pretended by the directorates thereof to be effected. To carry out this pretense they occupied the same office, their effects and assets were commingled, and the Nevada Company changed its name by taking the name of the Washington Company, "Washington-Alaska Bank," and announcement was made by the officers and persons in control of both said banks that they were consolidated. It is further alleged that, as the defendants well knew, the Nevada Company was insolvent; and that as the direct result of said transfer of stock and pretended consolidation the Nevada Company and its directors were placed in absolute control of the assets of the Washington Company and thereby were enabled to and did convert nearly the whole thereof to their own use. And it is charged that by said pretended consolidation the defendants intended, among other things, to deceive the public and the creditors of the Washington Company as to the true status of that company and its affairs, and that thereby the public and said creditors were deceived as to such status and affairs so that in 1911, when the pretended consolidated concern failed and closed its doors and a receiver was appointed by the Alaska Court and the assets were administered upon, said public and creditors and the Alaska Court and the receiver supposed and believed that the receiver was the official representative of and administrator upon the supposed consolidated corporation; but that by virtue of the *fact* (being matter of foreign law) that the laws of Nevada prohibited the Nevada Company

from consolidating with any foreign corporation, no consolidation really occurred and the receiver was the representative of the Nevada Company only; and that owing to the said deception practiced successfully by the defendants, it was not known until 1915 that there had been no consolidation, and that in the latter year, when this knowledge was first obtained, a receiver was appointed for the Washington Company in Alaska, and shortly thereafter the same person was appointed receiver for said Washington Company in Washington, where all the defendants live, and such receiver in Washington brings this action.

To this complaint the defendants demurred on several grounds, but relied upon two only, namely, that the complaint does not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law. The District Court sustained the demurrer on both grounds and entered judgment dismissing the complaint. To reverse this action of the lower court the plaintiff sued out the present writ of error.

## SPECIFICATION OF ERRORS RELIED UPON

The plaintiff in error asserts and urges that the District Court erred in the following particulars:

1. The Court erred in holding and deciding that the complaint of the plaintiff did not state facts sufficient to constitute a cause of action against the above-named defendants.

2. The Court erred in holding that the above-entitled action was not commenced within the time limited by law.

3. The Court erred in sustaining the demurrer of the defendants to the complaint of the plaintiff.

4. The Court erred in not overruling the demurrer of the defendants to the complaint of the plaintiff.

5. The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of defendants.

## ARGUMENT

The plaintiff contends that the contracts and conspiracy of September, 1909, by which the Washington Company was turned over to the Nevada Company and thereafter was despoiled by the latter, were the contracts and conspiracy of the defendants and the Nevada Company's directorate, not of the Washington Company itself. The position of counsel for the defendants, as we understand it, is that the "whole body of the stockholders," i. e., each and every stockholder considered collectively, is identical with the corporation, and that if all the stockholders were party to that conspiracy, *ipso facto* so was the corporation. They make no distinction between the action of each and every stockholder in dealing with his property *in his own private interest,* and the action of each and every stockholder *as a stockholder,* i. e., in dealing in the interest of the cor-

poration. They make no distinction, that is to say, between private action by stockholders and corporate action. We insist upon that distinction.

The plaintiff contends, as regards the branch of the demurrer based on the statute of limitations, that the defendants having admitted (for all present purposes) that the "sale" of their stock was null and void because *ultra vires* of the Nevada Company, and that therefore they are still the stockholders of the Washington Company and that the directors in office at the time of said sale have been at all times since and are still the directors of the Washington Company, and having further admitted that by the pretended consolidation they intended to deceive and did deceive all creditors and all others who might have caused steps to be taken in behalf of the Washington Company against the defendants, and having further admitted that there was neither a sale nor a consolidation, and that the receiver for the Nevada Company was not the receiver for the Washington Company, they have thereby, in legal effect, admitted that the statute of limitations did not run against the Washington Company's right of action against themselves until that company should by some means or other be placed in such hands that it could sue them, i. e., until it should be given a voice with which to speak and an arm with which to strike; and we maintain, therefore, that the statute of limitations did not begin to run until the receiver was appointed *for the Washington Company,* to-wit, in 1915, and that the action was commenced in ample

time. Whereas, the defendants assert, as we understand their position, that the time began to run when the supposed consolidated concern closed its doors in 1911 and expired three years thereafter.

The District Court, in its opinion sustaining the demurrer, adopts the positions of the defendants on both branches of their demurrer (tr. pp. 61-64, 69-71). The confusion of thought involved in the District Court's rulings herein will, we respectfully submit, become apparent as we proceed.

## I.

### *The Complaint States a Cause of Action*

On this branch of the demurrer to the complaint the District Court, we respectfully submit, went astray by failing to note, what we think is sufficiently clear on the face of the complaint, that the first fourteen paragraphs of the complaint contain nothing but formal allegations and matters of inducement, inserted for the purpose of exhibiting the origin and development of the banking business at Fairbanks and the status thereof existing, and the purposes actuating the defendants, when the conspiracy and combination of 1909, set forth in paragraph fifteen and subsequent paragraphs of the complaint, was entered upon by the defendants and the Nevada Company and the latter's directors. In said first fourteen paragraphs (tr. pp. 3-24) are set forth various contracts to which the Washington Company was a party, and those contracts show clearly

that the owners of the said two banks, and of the First National Bank of Fairbanks, during a period of time commencing practically with the opening for business by said three banks, were intent upon reducing competition among said banks, and upon holding at as high a level as possible the rates and charges for services rendered by the banks to their customers and the public, and upon holding at as low a level as possible the price paid by the banks for gold-dust—the purchase of gold-dust or the handling of it upon a percentage basis being at all times a main item and feature of the business of each of said banks. *All of these contracts were in plain violation of section 3 of the Sherman Anti-Trust Act.* These contracts, described and copied in the first fourteen paragraphs of the complaint, were made in the names of the three banks, or in the names of some of them and in those of the directors or stockholders of the others. So far as the contracts were made by the banks the latter were no doubt parties to the violation of the Sherman law as between the banks and their customers, whatever may be the case when the question of responsibility for such violation of law is narrowed down so as to lie between a given bank and its own directors and officers by whose action it became a party to the contracts. *As to its own customers, and, indeed, as to the customers of the other banks also,* the Washington Company became a law violator, became liable under said section 7, by its becoming a party to the contracts mentioned in the said matter of inducement in the complaint. We do

not blink that fact. But we maintain that said prior participation by the Washington Company in prior illegal contracts is wholly unrelated to the plaintiff's right to recover herein, for the following reasons: (1) Those prior contracts were separate and distinct from the one in suit, as is shown by the fact that the parties thereto were not the same, for from the contract in suit the Washington Company was expressly excluded for the very purpose of making it the butt and victim of the conspiracy, and by the further fact that the purposes and intended means of accomplishing these purposes were not the same or even similar; (2) no damage to the Washington Company is alleged or shown to have resulted from said prior contracts except the comparatively small and separable sum of $5,000 claimed for the loss of the use of money paid for stock of the said First National Bank (tr. pp. 14, 47)—an allegation inadvertently made and which can and should be rejected as surplusage—but, on the contrary, all damage charged, except that inadvertently alleged as just stated, flowed from the conspiracy alleged in paragraph fifteen and succeeding paragraphs; (3) this is a suit by a corporation's receiver against its directors and stockholders, not a suit between the bank and its customers or the bank and the other banks, and consequently even if the Washington Company had been a party to the last mentioned conspiracy (which it clearly was not) instead of the deliberately selected victim of it, the corporation could recover against the natural persons who were

responsible for its participation therein to its loss, whether its directors or stockholders or both.

## A.

## The Contracts and Conspiracy of September, 1909, Were Separate and Distinct from Those Preceding Them

It is true that in paragraph XI of the complaint (tr. p. 12) it is alleged that the first agreement, combination and conspiracy entered into was continued up to and including January 4, 1911, but that allegation, when read in the light of the others in the complaint setting forth specifically *in ipsis verbis* the subsequent contracts, means no more than that the purpose to control the banking business at Fairbanks and to eliminate competition therefrom, persisted in the minds of the parties to said original contract, *or some of them,* down to 1911, as evidenced by said other contracts. Though technically the directors or officers of the banks were not parties to most of the written contracts set forth in the complaint, the contracts being in form contracts of the corporations, yet in the nature of things the directors were parties to the conspiracies and combinations evidenced by said contracts. Therefore it is correct to say that the parties to each unlawful combination and conspiracy were the banks signatory and the directors of such banks. But though in the nature of things the directors of any signatory bank must have been parties to the breach of law involved

in entering into such contract, combination and conspiracy, the converse is *not* true: it is not true that because the persons who were directors of a given bank were parties to an unlawful conspiracy and combination, therefore the bank was a party too. Thus, considering paragraph XIII of the complaint (tr. p. 14), it is charged that the Washington Company and the Nevada Company and their directors suspected that the First National Bank was violating the original agreement of 1905, and, therefore, to carry out the purpose of that agreement, determined to buy and did buy the stock of the First National Bank. It is clear that the First National Bank was not and could not be a party to *that* agreement to sell its stock, though its stockholders, not as stockholders, but as individuals, were such parties; and it is also clear therefore that the First National Bank was not a party to the plan of the Washington Company and the Nevada Company and their directors involved in that particular conspiracy. For the sale of that stock by those stockholders, as individuals, was individual, not corporate, action. The stockholders of the First National Bank, as individuals, may or may not have been parties to such plan and have intended to further it by such sale, but the First National Bank clearly was not a party thereto. Whether by virtue of said sale and the consequent surrender of the First National Bank to the Washington Company and Nevada Company, the First National Bank ceased to be a party to the original combination and

conspiracy—and to any combination and conspiracy—is a question which will, in effect, be answered hereinafter. Whether by said sale the selling stockholders of the First National Bank were parties to said plan to further concentrate and control the banking business at Fairbanks, which was the actuating motive of the purchasers of the stock, is a question of fact, depending for its answer upon the *quo animo* or intention of the sellers or upon the natural result of that sale; if their purpose was to further that end, or if they knew that the direct and natural result of the sale was to further that end, then they were such parties (*Standard Oil Case,* 221 U. S. 1, and *Tobacco Case,* 221 U. S. 106).

Another contract to which the First National Bank was not a party, either nominally or actually, is that set forth in paragraph XIV of the complaint (tr. pp. 22-24); its purpose was, apparently, to equalize the profits of gold-dust handling as between the Washington Company and the Nevada Company.

Still other agreements to which the First National Bank was in no sense a party are those set forth in paragraph XV of the complaint and subsequent paragraphs (tr. p. 24, ff.). And neither was the Washington Company in any sense a party to the last mentioned agreements.

So that it is clear that the above-mentioned allegation in paragraph XI of the complaint, that the original agreement, combination and conspiracy of 1905 was continued down to 1911, means, when read

in connection with the other allegations of contracts entered into later, only that the abstract purpose which was the motive for entering into said original agreement continued and persisted down to 1911; that it was concretely present during *all* of that time, *not in all of the parties* to the original combination and conspiracy, but, as the process of elimination above used demonstrated, *in only a part of said parties.* For first we find the First National Bank, as a corporation, excluded, and later the Washington Company, as a corporation, is excluded. To the conspiracy evidenced by the agreements set forth in the fifteenth and succeeding paragraphs it is clear that neither the first National Bank nor its *real* stockholders nor its *real* directors were parties. We say "real" because the so-called sale, above mentioned, of the stock of the First National Bank to the other two banks was *ultra vires* of the purchasing banks, and therefore null and void, and of course the result is that the "sellers" of the stock continued to be stockholders, and the directors theretofore chosen from among their number continued to be the First National Bank's directors, after the "sale" no less than they were before (see tr. p. 41). Now said true stockholders and directors of the First National Bank are not alleged to have even known of the contracts alleged in the fifteenth and later paragraphs. While, therefore, the complaint does not affirmatively allege that the First National Bank dropped out of the original and every subsequent combination and conspiracy, it is patent from

the allegations made that it did so drop out. It does not follow that having once become a party to such a combination and conspiracy it could not cease to be a party if any members of the combination persisted in the original plan, or in a subsequent but similar plan. The very purpose of sections 4 and 5 of the Sherman Act is to dissolve combinations. The law itself contemplates an enforced dropping out of all the parties to a combination. The same result may be attained by the voluntary action of the parties. If all may discontinue, then some may discontinue, notwithstanding that others continue in the unlawful combination and conspiracy. This is not to say that any party, by so discontinuing, can escape its or his liability under section 7, or under sections 1, 2, or 3, for acts done prior to ceasing to be a party, or for damages accruing subsequent to so ceasing to be a party but being the proximate and natural and probable consequences of acts done theretofore. But by the very act of ceasing to be a party it or he would be freed from liability for all damages subsequently accruing and disconnected from and not proximate to or naturally flowing from the acts done prior to so ceasing to be a party.

For instance, the First National Bank was a party to the original agreement but certainly it could not be held responsible by the creditors of the Washington Company for the damages they sustain through the insolvency of the latter company caused by the things and acts alleged in the fifteenth and subsequent paragraphs. For, as the complaint shows,

the First National Bank was in no way a party to those matters, *unless* participation in the other and prior contracts made it so. The argument that it was and is so responsible because each member of a conspiracy is responsible for the acts of every other member done in and about furthering the conspiracy, does not refute this position because it begs the question,—it assumes that the original conspiracy still existed because a purpose of controlling the banking business which actuated said original conspiracy also actuated the making of the contracts set forth in the fifteenth and later paragraphs. But it was not the same conspiracy or combination, as we have already shown, because it was *by* different parties (namely, only a part of the members of the original conspiracy) and was *for the benefit* of different parties (namely, only a part of the original parties), and it was to be accomplished by different *means* (namely, by the total elimination of a bank wholly outside the membership of the last mentioned conspiracy, though a member of the original one, namely, the Washington Company). If different parties, wholly different distribution of benefits, and different means of accomplishing purposes, do not indicate and demonstrate different and distinct conspiracies, we are at a loss to know what would.

Indeed, it seems absurd to say that a combination directed to the mutual benefit of A and B and C is the same as a combination devoted to the benefit of A and B only, such benefit to be obtained by the de-

signed and calculated destruction of C. It seems absurd to say that a combination intended to benefit mutually the Nevada Company, the Washington Company and the First National Bank of Fairbanks, or the first two banks only, is identical with a combination intended to benefit the Nevada Company and the stockholders of the Washington Company, *not as stockholders but as individuals,* by means of the destruction of the Washington Company.

By means of numerous contracts three distinct conspiracies are set out in the complaint, two of them as a matter of inducement and the third as the ground of this action. The first one is the conspiracy *between the three banks* in 1905 (which we call herein the original conspiracy), set out in paragraph X (tr. pp. 8-12). The second one is the conspiracy between the Nevada Company and the Washington Company (and *possibly* the stockholders of the First National Bank), set out in paragraph XIII (tr. p. 14). The third one, and the ground of action in this case, is the conspiracy between the Nevada Company, and its directors, and the stockholders of the Washington Company, set out in paragraph XV and succeeding paragraphs (tr. p. 24). While all three were directed at controlling the banking business at Fairbanks and the surrounding country, the first was aimed at controlling it and keeping it in the hands of the owners of three banks; the second at keeping it in the hands of the owners of two banks; the third at keeping it in the hands of the owners of one bank.

The purposes and results of the last-mentioned conspiracy are a good test as to whether the Washington Company was really a party thereto (we say really, because it was certainly not nominally a party thereto). If the corporation, as such, participated in that conspiracy it certainly must have been because of expected advantage or profit to itself as a corporation, but so far from that being the case it had nothing to expect but absorption of its substance by the Nevada Company, and *that* was the result. It may be asserted that, though it would be an abuse of their power and position, a corporation may be made by its stockholders or directors to enter a conspiracy, if they can see that, though it will hurt the corporation, it will benefit the stockholders. But as we have already shown, the stockholders, *as such,* can be benefited only if the corporation is benefited, no matter what may be the case as to any individual benefit which they may reap. Certainly it was not as *stockholders* but as *disposers of property* at an enormous excess over its real value that the defendants profited. And it was not as a stockholder thereafter that the Nevada Company profited, but as a despoiler and pillager of the Washington Company. It simply took advantage of its position to rob the Washington Company. It is indisputable, we hold, that the fortunes of a stockholder, as such, go up or down as the fortunes of the corporation go up or down.

But, it may be argued, and was argued in the lower Court, that it is immaterial if the conspiracy

of 1909 was distinct from the other two, for the complaint charges that *all* the stockholders of the Washington Company entered into it, and all of the stockholders are identical with the corporation; therefore the corporation was a party to said third conspiracy.

## B

## A Corporation Is Not Indentical with All Its Stockholders

It is indispensable to the supporting of the demurrer for insufficiency of the complaint that the whole body of the stockholders should be held to be identical with the corporation. Each and every one of the stockholders of the Washington Company was a party, the complaint charges, to the combination and conspiracy of September, 1909. It is manifest from the complaint that the Washington Company, *as a corporation,* was not such party. *It* did not assign the defendants' stock to the Nevada Company. *It* did not plan that the banking business should be centered in the Nevada Company by and through its own destruction and ruin. We should deem it a waste of this Court's time, and an inexcusable trespass against its patience, to dwell upon this point were it not for the fact that the lower Court fell into the error of assuming that the corporation and the whole body of its stockholders are identical, and that if *all* the stockholders do a certain act that act is therefore the act of the corporation. In ruling on the demurrer, the lower Court said (tr. p. 61):

> " * * * it is sought to draw a distinction between the whole body of the stockholders of the corporation and the corporation itself, so as to place the guilt, if any, upon the stockholders, and still leave the corporate entity guiltless."

Again (tr. p. 65):

> "All the stockholders of this corporation, it is alleged, joined the combination. The receiver, then, represents no person who is directly interested who is not a party to the unlawful combination, and as such party to an illegal combination, cannot sue under the Sherman Act for damages which he has suffered."

Our answer to this is that the receiver does represent the corporation and that the corporation was *not* a party to, but was the carefully selected victim of, the combination and conspiracy of 1909, and that the receiver, in the corporation's right, *can* sue under the Sherman Act for the damages it sustained therefrom.

In order to preserve clarity of thought it is necessary to look squarely at the ambiguity which lurks in the expression "whole body of the stockholders," used by the lower Court. Stockholders are natural or artificial persons who bear a certain relation, well defined by law, to a corporation; in this use of the word *the relation is a part of the definition* of it; for instance, "the stockholders elected A, B, and C directors of the corporation"; that is an activity strictly *as stockholders*—the relation is part of the very idea; that is the *proper* meaning of the term. But the term is also used to refer to those persons,

not in connection with this relation *as a part of the definition* of the term but only as a *description* of persons—a description used in connection with some relation entered upon or sustained by those persons to something other than the corporation; for instance, "the stockholders of company A have organized company B"; so used, it clearly means that certain persons, who are stockholders of company A, have, *not as stockholders of A but as individuals,* organized company B; it is no part of their business as stockholders of A to do anything except act in regard to the business of A—it is no part of their business as such stockholders to organize B. And it is immaterial that it is "the whole body of the stockholders" who act, i. e., each and every one of them; it is still personal, individual action, not action in the relation which gives the import to the term "stockholders" when properly and strictly used. When it is said that the whole body of the stockholders of the Washington Company sold their stock to the Nevada Company, nothing more *can* logically be meant than that each and every person *who answered to the description* of stockholder of the former company, acting in his personal and individual capacity, not acting as a stockholder, sold his stock to the latter company. It is no part of the business of a stockholder, and it is *not within his power* as a stockholder, to sell his stock. That is simply individual action dealing with his property, not action as a stockholder.

In discussing this case one must mark carefully

which meaning attaches to the word "stockholders" in a given statement or proposition. This dual meaning of the term was kept clearly in mind by the Supreme Court of Ohio in *Goodin v. Cincinnati etc. Co.,* 18 Oh. St. 169, 183, when it said:

> "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders, as well as himself, have personal interests in conflict with those of the company. He does not represent them as *persons,* or represent their *personal* interest. He represents them as *stockholders,* and their interests *as such.* He is trustee for the *company,* and whenever he acts against *its* interests—no matter how much he thereby benefits *foreign* interests of the individual stockholders, or how many of the individual stockholders act with him—he is guilty of a breach of trust, and a court of equity will set his acts aside, at the instance of stockholders or creditors who are damnified thereby. Any act of the directory by which they intentionally diminish the value of the stock or property of the company is a breach of trust, for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited. in some other way, more than they are injured as such." (The italics are the Court's.)

Now, the proposition, accepted and adopted by the lower Court, that a corporation is identical with the body of its stockholders, is at daggers drawn with fundamental conceptions regarding corporations and, with great deference to the District Court, is

not the law. Could each and all of the stockholders, uniting in a deed of the corporation's property, convey it away? Would their act be the act of the corporation? If a debt be owing to the corporation could each and all of the stockholders join in a suit to recover it?

In *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 277-279, 34 S. W. 209, 215, the Court said:

> "The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. * * * A corporation and its shareholders are distinct legal entities. In *Keith v. Clark,* 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, 'the bank and the State are entirely different legal entities,' and in *Lillard v. Porter,* 2 Head, 177, it was said, 'stockholders are totally distinct from the corporation.' Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.
>
> " 'Shareholders,' says Thompson, 'are not joint tenants, or in any other sense, co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so

much of the fund thus created as remains unimpaired, and is not liable for the debts of the corporation.' Thomp. Corp. §1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed."

In *Wheelock v. Moulton,* 15 Vt. 519, 522, Moulton and Hutchinson, owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repayment of money borrowed from Wheelock. The suit was to enforce the mortgage. Judge Redfield, speaking for the Court, said:

> "The fact that the signers of this deed owned the whole of the shares, will make no difference, in regard to the necessity of a vote of the corporation, in order to convey the land. The *title* to the land was in the corporation, not in the individual stockholders. The deed of one, or any number of the stockholders will not affect the *title* of the land. The share owners are not tenants in common of the land. They have no title, whatever, to any of the property of the corporation. It is true that one, who owned all the shares, might control the corporation, and so he could if he owned a majority of the shares; *but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation.* This, in the present case, was not attempted. And the deed is what its terms import—that of Moulton and Hutchinson, *in their private capacity.*"

In *Button v. Hoffman,* 61 Wis. 20, the argument underlying the view of the lower Court in the case at bar was put baldly, and was answered by the Court, thus:

"The evidence of the plaintiff's title was that the property belonged to a corporation known as 'The Hayden & Smith Manufacturing Company,' and that he purchased and became the sole owner of all the capital stock of said corporation. As the plaintiff in his testimony expressed it, 'I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, *and I am the company.'* * * * Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: 'The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, *and thus became its sole owner.'* From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, *and do business,* sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. * * * These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, *and does not himself become the corporation,* as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else."

In *Gallagher v. Germania Brewing Co.,* 53 Minn. 214, 219, 54 N. W. 1115, 1116, the plaintiff sued to

recover for goods sold and delivered by his assignor to the defendant corporation. B. and V., sole owners of the corporation's stock, intervened, setting up their exclusive ownership of the stock, and their ownership of two judgments, one in favor of B., the other in favor of V., against the plaintiff's assignor, recovered before the assignment to plaintiff, and which judgments, on account of the insolvency of said assignor, they prayed to be equitably set off against the plaintiff's claim. Judge Mitchell, speaking for the Court, discussed the intervenor's contention, and said:

> "To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest.
>
> * * * * * * * *
>
> "Illustrations might be multiplied indefinitely to show that to recognize any such right (of set-off) would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders."

In the English case of *Foster & Son, Limited, v. Commissioners of Inland Revenue,* (1894) 1 Q. B. 516, the question was, whether the transfer of the property of a partnership by the eight members thereof to a limited company organized by them to take over and conduct the business was subject to an *ad valorem duty* "upon conveyance or transfer

on sale of any property," under the terms of the Stamp Act. The lower Court was divided in opinion, one judge being of opinion that the eight persons and the corporation were not identical, but the other judge being of opinion that they were identical. The case was therefore carried to the Court of Queen's Bench, where by a unanimous Court the corporation and the eight persons were held to be not identical. Lord Justice Lindley said:

> "Although the persons of the first eight parts may be, and were, members of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. * * * Now, what is that instrument? It is certainly a conveyance of property—that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. * * * But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial."

And Lord Justice Kay said:

> "In the first place, a corporation is a different thing from the individuals who compose it."

And Lord Justice Smith said:

> "It seems to me that the company limited are not the same persons as the eight members of the old firm—they are different altogether."

See, as representative of a vast number of authorities supporting the same doctrine:

*Humphreys v. McKissock,* 140 U. S. 304;
*State v. Morgan's L. & T. R. & S. S. Co.,* 106 La. 513, 525, 31 So. 115, 121;
*Baldwin v. Canfield,* 26 Minn. 43;
*Puritan Coal Mining Co. v. Penn. Ry. Co.,* 85 Atl. 426, 433;
Morawetz on Priv. Corp., §§227-234;
Green's Brice's *Ultra Vires* (2d. Am. Ed), §§1, 2.

## C

## Exceptions to the Rule that a Corporation is an Entity Distinct from Its Stockholders

In a few early cases the courts ascertained the citizenship of the corporation by the citizenship of its stockholders. This was done in determining whether the federal courts had jurisdiction on the ground of diversity of citizenship. *Bank of United States v. Deveaux,* 5 Cranch (U. S.) 61. But later this method of determining the citizenship of a corporation (i. e., by examining into the citizenship of the stockholders) was abandoned and repudiated by the very courts which had used it; and a corporation for a long time past and now, alike in federal and state courts, in law and equity cases, has been and

is universally held to be a citizen and inhabitant of the jurisdiction under the laws of which it was organized. *Louisville Railroad Co. v. Letson,* 2 How. (U. S.) 497, 554-559; *Marshall v. Baltimore & Ohio Railroad Co.,* 16 How. (U. S.) 314; *Muller v. Dows,* 94 U. S. 444; *St. Louis & San Francisco Ry. Co. v. James,* 161 U. S. 545.

So that this class of cases is no longer an exception to the rule, that a corporation is an entity separate and apart from its stockholders, and has not been such exception for a long time past.

ation, when such contracts are intended to inure to its benefit, and do in point of fact inure to its benefit, and the benefit is accepted by it, and the contracts are thereby adopted. 1 Redfield, Law of Railways (5th ed.), p. 18; *Edwards v. Grand Junction Ry. Co.,* 1 Mylne & C. 650; *Stanley v. Birkenhead Ry. Co.,* 9 Simons 264; *Little Rock & F. S. R. Co. v. Perry,* 37 Ark. 164; *Bommer v. American etc. Mfg. Co.,* 81 N. Y. 468. But if the benefit is not actually accepted by the corporation and the contract thereby

adopted, the contract is not enforceable against it. *Penn. Match Co. v. Hapgood,* 141 Mass. 145, 7 N. E. 22; *Caledonian & Dumbartonshire Ry. Co. v. Magistrates of Helensburgh,* 2 Macqueen's Appeals (House of Lords) 391; *Gent v. Insurance Co.,* 107 Ill. 652; *Morrison v. Gold Mt. G. M. Co.,* 52 Cal. 306; *Hawkins v. Mansfield G. M. Co.,* 52 Cal. 515; Morawetz on Priv. Corp., §§547-549. And (2) where individuals create a "paper" corporation to cover a fraud or wrong, or by means of a corporation already existing intentionally cover a fraud or wrong, or resort to the corporate form to free themselves from individual obligations which, prior to the organization of the company, attached to them with respect to the business they propose to carry on by means of the company. Such were the cases of *Linn & Lane Timber Co. v. United States,* in this Court, 196 Fed. 593; *McCaskill Co. v. United States,* 216 U. S. 504, 514-515; *United States v. Milwaukee Refrigerator Transit Co.,* 142 Fed. 247; *In re Rieger,* 157 Fed. 609.

But these classes of cases have nothing in common with the case at bar. In the first class, the corporation, when it becomes organized, is held to adopt the contract. In the second class, the incorporation is considered merely colorable, and the corporation is held to be bound by the obligations of the corporators. Both classes are almost invariably in equity and exist, *absolutely invariably,* for the prevention of fraud and for the forwarding of right. The case at bar is at law, and the defendants

ask that the corporation be absolutely identified with them—and for what purpose? *To frustrate a right and to protect a fraud and wrong.*

After referring to the exceptional classes of cases just mentioned, Cook says in his work on Corporations, §§663, 664:

> "The above illustrations, however, *are merely exceptions to the general rule* that a corporation is an entity that exists independently of its stockholders and that that entity will be respected and upheld by the courts."

The general rule is recognized even in the very cases which belong to the said exceptional classes. Thus, in *McCaskill Co. v. United States, supra,* the Supreme Court of the United States said (216 U. S. 504, 514):

> "Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest."

And in *United States v. Milwaukee Refrigerator Transit Co., supra,* the Court said (142 Fed. 247, 255):

> "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity *as a general rule, and until sufficient reason to the contrary appears;* but, when the notion of legal entity is used *to defeat public convenience, justify wrong, protect fraud, or defend crime,* the law will regard the corporation as an association of persons."

Morawetz says in his work on Private Corporations, §227:

> " * * * courts of law, as distinguished from courts of equity, do not, as a rule, look beyond the fiction of a separate corporate entity. * * * At law, a corporation and its shareholders are considered as entirely distinct from each other."

And in §232 the same author says:

> "It has been pointed out, that the fiction by which a corporation is treated as an entity distinct from its shareholders has its important uses. In many instances, the application of this fiction is absolutely essential; and it may be laid down as a general rule, that the convenient administration of justice is best served by treating a corporation as a collective entity, without regard to its individual shareholders, *in all cases except those in which the equitable rights and liabilities of the shareholders cannot be ascertained and enforced* without considering the real relation existing between the parties.
>
> "Liabilities incurred by parties in a corporate capacity are materially different in their scope and effect from liabilities incurred in a personal capacity, whether severally or jointly, or as partners. It is a question of intention whether the parties have incurred a liability of the one class or the other, and the intention of the parties is indicated by the form in which they have contracted or acted. If persons use a corporate name or form in entering into a contract, this indicates that they intend to contract as a corporation, and not personally; and if they enter into a contract under a firm name, or individually, this is *prima facie* evidence that they intend to be bound personally. This distinction must be observed even where all the shares in a corporation are held by a single person; his transactions in the corporate name

> *would differ in substance and legal effect,* as well as in form, from those entered into personally. *In all cases it is indispensable that the fiction of a corporate entity apart from the individual shareholders be preserved unimpaired, in measuring and enforcing those rights and obligations which are of a corporate character."*

The ground of the exception, then, is always and unfailingly the same; namely, prevention of fraud and wrong. Practically all of the cases are in equity. But even some law cases *recognize* the principle which creates the exception—i. e., that, if to apply the doctrine that a corporation is distinct from its stockholders would result in protection to fraud or wrong, the doctrine will not be applied, but the corporation and stockholders will be considered identical. We say "recognize" the principle, for in no case at law that we have found, has the exception actually called for application. For instance, the principle was recognized in a case on which the lower Court relied, in the case at bar, very greatly; namely, *State v. Standard Oil Co.,* 49 Oh. St. 137. But in that case the corporation, *as such,* was guilty of illegal and *ultra vires* acts, and therefore there was no occasion actually *to apply* the exception. But it is clear, from what the Court says in that case, that if the unearthing of the wrong and the striking down of the barrier protecting fraud had depended upon doing so, the Court would have applied the exception, even in that case at law. What we insist on is this, that whether it be an equity case or a law case, the ground for the exception and

its application is always the same—prevention of fraud and wrong. Most clearly, therefore, there is no possible ground in this case upon which the defendants can invoke the application of the exception, no possible reason for them to insist that they and the corporation are identical. For they do not invoke the exception in order to unearth fraud or prevent wrong, but to protect fraud and wrong, and the Court will not hear them for that purpose.

The cases of *State v. Standard Oil Co.,* 49 Oh. St., 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, just now referred to, and *People v. North River Sugar Refining Co.,* 121 N. Y. 587, 24 N. E. 834, 9 L. R. A. 33, are much relied upon by the lower Court in this case (tr. pp. 62-64). Both of those cases were in the nature of *quo warranto,* and therefore were at law. Because those two cases seem to be the authorities on which, almost if not quite exclusively, the lower Court seems to have sustained the demurrer herein on the ground of failure of the complaint to state a cause of action, they demand a detailed consideration. We will first consider the Ohio case and then the New York case.

*State v. Standard Oil Co.,* 49 Oh. St. 137.

We have stated that this case was at law, but it is apparent that it was treated more as an equity suit than as a law action. The prayer of the amended petition closed with the words "and that such other

relief be granted in the premises as to the court may seem just and proper," and the relief actually granted by the Court was granted under this general prayer—no part of the relief specifically prayed for was granted. We mention this only incidentally, for it is not upon this narrow ground of the form of the action or the character of the relief given that we place our statement that the case forms no exception to the rule that courts recognize the non-identity of stockholders and corporation, except where to do so would protect fraud or wrongdoing.

The case shows on its face that the defendant company, *in its corporate capacity,* was an active participant in the *ultra vires* combination and trust set forth in the opinion. The contract creating the terms and conditions of the trust provided that in each of the four States of Ohio, Pennsylvania, New Jersey and New York, a corporation should be organized to be called the "Standard Oil Company of — — — —" (here followed the name of the State under which it was organized), "provided, however, that instead of organizing a new corporation, *any existing charter and organization may be used for the purpose when it can advantageously be done";* and the contract further stipulated, in paragraph II, sub-paragraph (7), that "all the property, real and personal, assets, and business, of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred and vested in the said several Standard Oil Companies. All of the property, assets, and business

in or of each particular state shall be transferred to and vested in the Standard Oil Company of that particular state,'' and in sub-paragraph (9) is a similar provision regarding other corporations and partnerships conveying all their property and assets to the Standard Oil Company ''of the proper state.''

Now, no new Standard Oil Company was organized in Ohio under the terms of this contract, but the then existing company, the one organized in 1870, *the defendant in the case,* took over the property of said numerous other corporations and partnerships in Ohio, and acted as the holding company, or, more properly speaking, the absorbing company of those other concerns, during a period of eight years.

As the Court says in its opinion, 49 Oh. St. 179, 30 N. E. 288:

> ''The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, The Standard Oil Company of Ohio, being one. It is then covenanted by the parties, that as soon as practicable, a corporation shall be formed in each of certain states, under the laws thereof, Ohio being one, to mine for, produce, manufacture, refine and deal in petroleum and all its products; with the proviso, however, that instead of organizing a new corporation, any existing one 'may be used for the purpose when it can advantageously be done,' *and in Ohio the defendant has been so used.''*

The Court further says, 49 Oh. St. 183, 30 N. E. 289:

> " * * * and the averment in the answer that the dividends of the company are paid to the holders of its stock, 'appearing as such on its stock books,' is immaterial; since these persons are not the owners, but the trustees of the stock. In fact the averment is simply a part of the evidence, *that the company, through its directors, recognizes and performs the agreement on its part.* The payment of its dividends to the persons appearing as stockholders on its stock-books, is what enables the parties to the agreement to realize the primary object of the trust agreement."

The proceeding to forfeit the defendant's charter was begun in 1890, so that for eight years the defendant, the Standard Oil Company of Ohio, had been an active participant in the combination and trust. As such it must have received and accepted, as a corporation, grants of all the property of several other concerns and held such property as its own under the trust arrangement, and in all things carried out the terms of the trust agreement.

As we have already stated, the Court in that case expressly recognizes the grounds for not following, in some cases, the rule that a corporation and its stockholders are separate and distinct; it expressly says that, *to prevent fraud and wrong,* courts will refuse to view a corporation as distinct from its stockholders. This is the Court's language, 49 Oh. St. 179, 30 N. E. 287:

"Now, so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, *should not be called in question;* but where it is urged *to an end subversive of its policy,* or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals, and in respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders, having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. *If it were otherwise, then, in one department of the law fraud would enjoy an immunity awarded to it in no other.*"

Again the Court says, 49 Oh. St. 177, 30 N. E. 287:

"All fictions of law have been introduced for the purpose of convenience and *to subserve the ends of justice.* It is in this sense that the maxim *in fictione juris subsistit aequitas* is used and the doctrine of fictions applied."

Certainly the recognition of the fiction that a corporation is an entity separate and distinct from its stockholders "subserves the ends of justice" in the case at bar. That fiction should therefore be here recognized and applied.

*People v. North River Sugar Refining Co.*, 121 N. Y. 587.

This also was a trust case. Various companies engaged in refining sugar entered into a trust. With great respect and deference for the lower Court herein, we confess ourselves at a loss to understand how, in the light of the second quotation (tr. p. 63) made by the lower Court from *People v. North River Sugar Refining Co.*, the Court could have failed to note that the *corporation itself* in that case, in its corporate capacity, was guilty of *ultra vires* acts in entering a trust, properly subjecting it to forfeiture of its charter. We quote from the opinion, 121 N. Y. 615, 9 L. R. A. 1, 41:

> "On the 22d day of April, 1887, there was a meeting of defendant's stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote:
>
> "'Whereas, it is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and
>
> "'Whereas, *we deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation;* therefore be it
>
> "'Resolved, That Peter Moller, Jr., George H. Moller and Gerd Martins be, and they are hereby, appointed a committee to make arrangements *to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act and to sign all contracts and agreements in the name of said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.*

" 'Resolved, that *we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements and papers which the above-named committee may make in relation to the said consolidation.'*

"*In September following the secretary of the corporation added his signature to the deed.* He tells us under oath: 'I made that signature by virtue of authority from the stockholders and the board of officers of the North River Sugar Refining Company, the stockholders *and trustees.'* * * * *Here was a deliberate corporate act,* if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. *At that moment the defendant Company had become a party to the contract* by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency."

So it was very palpably a case of corporate action. Another consideration: The Court expressly recognizes and holds that if, instead of the stock of the company having been placed in the hands of trustees, it had been sold, out and out, as the defendants herein sold their stock (so far as they could—they undoubtedly believed they had sold it, though the "sale" was wholly void), then, in that event, the corporation would have been guiltless; guiltless, even though the stock had thereafter been used to control the corporation to unlawful ends. If it had been a sale of stock, says the Court, the corporation would not have been guilty. The fact that in the case at bar the "sale" was void can make no dif-

ference in the application of that principle herein. The Court said:

> "But that proof (namely, proof that the corporation was in the trust arrangement) does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board (i. e., of the trustees of the pool) *by its own voluntary action,* or the will and power of others than itself; by force of a contract to which it was in reality a party, *or as the simple consequence of a change of owners;* by its fault or its misfortune; *by a sale or by a trust.* For if it has done nothing, if what has happened and all that has happened is ascertained to be that the stockholders of the defendant, one or many, *sold absolutely* to the eleven men who constituted the board *their entire stock,* and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, *it is difficult to see wherein the corporation* has sinned, or what it has done beyond merely omitting for a time to carry on its business."

The Court held that the transaction was a trust or pooling arrangement, not a sale.

Hence that case is clearly distinguished from the case at bar, and is no authority for the ruling of the lower Court herein, for two reasons: (1) the corporation, *as such,* by *ultra vires* conduct violated the law; (2) the Court there says that if the transaction had been a sale of stock to the trustees of the pool, not a mere trust arrangement, the corpo-

ration would not, as a corporate entity, have been guilty of *ultra vires* or illegal conduct—the transaction would have been its "misfortune," not its "fault." In the case at bar the "sale" had all the effects and results in fact, though not in law, of an absolute sale, and what befell the Washington Company thereby and thereafter was certainly its misfortune, not its fault.

## Neither the Ohio Case nor the New York Case Supports the Ruling of the Lower Court Herein

The corporation was held to be a law violator in each of these cases. In neither case was it necessary to identify corporation and stockholders in order to reach such decision. For, assuming its separate entity, the corporation, in each case, was guilty. Therefore all that was said in the opinions about the corporation being accountable *because* it was identical with the stockholders, was both a dictum and a *non sequitur.* The argument of the Courts in these cases runs as follows:

Major premise: If the stockholders do acts intended to affect the corporation with *ultra vires* conduct to the wrong of and fraud upon the State, the corporation itself, because it must be identified with the stockholders where necessary to do so in order to prevent such fraud and wrong, will be held guilty;

Minor premise: This corporation, *considered as a corporate entity,* has itself performed *ultra vires* acts to the fraud upon and wrong of the State:

Conclusion: Therefore this corporation is guilty.

A palpable *non sequitur.* All that it was necessary to hold, and therefore all that was *decided,* in either of these cases, was, that where a corporation in its corporate capacity does *ultra vires* acts, it must answer to the State therefor.

But the dicta in these cases do not support the lower Court's ruling herein. They are simply assertions that while the general rule is that corporation and stockholders are separate and distinct, yet the exception to the rule is that, *to prevent fraud and wrong,* they will be considered identical. The very rule and exception which we have insisted on. The lower Court herein invoked the exception, not to prevent fraud or wrong (the only reason for ever invoking it), but to permit the escape of the defendants from the consequences of their fraud and wrong. It may be stated as an absolutely universal rule that the exception can never be invoked *to free a defendant from the charges made in the complaint, but only to bring the corporation within the scope of those charges.* It is also universally true that the exception, whenever it applies at all, applies *against* the corporation, never *in favor of* the stockholders.

Therefore neither decision nor dictum in either of these cases supports the action or the reasoning of the lower Court herein in ruling on the demurrer.

But a still further reason, and a most cogent one, why the Ohio case and the New York case do not and could not support the reasoning or the action

of the lower Court herein, is that those cases were by the State against the corporation. They were by a third party. Here there is no third party. The question lies between the two parties only—corporation on the one hand, and stockholders on the other. We do no more than allude to this point at this time because we discuss it fully hereinafter.

## D

## The Doctrine that In Pari Delicto Potior Est Conditio Defendentis Has no Application to This Case

While the lower Court relied mainly on the theory that a corporation and its stockholders are identical, and mistakenly called the Ohio case and the New York case to the support of its ruling, the counsel for defendants herein, though they also have ridden that horse hard, have not been content to ride that horse only. They have attempted in argument in the lower Court, and may attempt here, to bestride another one which runs in the opposite direction. They say that if the defendants were guilty as charged in the complaint, the Washington Company, of which they were and are the stockholders, was equally guilty—*in pari delicto.*

Now, of course, the expression *in pari delicto* not only involves but *is* a comparison between two terms —here, between stockholders and corporation. If those terms are identical, if the stockholders *are* the corporation, then there are not two terms, but only one, and it becomes impossible to apply the phrase *in pari delicto.* Any attempted application of it

would be unmeaning. Whatever in thought is necessarily unmeaning, is absolutely impossible. Therefore, as a basis for the argument that the corporation was *in pari delicto* with the defendants, the defendants' counsel have been driven to postulate not only the separate and distinct identity of the Washington Company, but such an identity as could think, devise, scheme, and commit torts. Since the legal theory of identity of corporation and stockholders, properly understood and applied, affords no ground for the action of the lower Court herein, it becomes necessary to inquire whether, though the Court did not itself rely on it, this other and contradictory theory of *in pari delicto* will sustain the lower Court's ruling on the demurrer.

If the facts of this case, as alleged in the complaint, presented any such question, we would say that it is absurd to assert that, where all the stockholders thrust a corporation into an *ultra vires* and wrongful act, the corporation, *as between itself and them,* is *in pari delicto* with them. But here, in the conspiracy of September, 1909, for damages from which we are suing, the corporation had absolutely no part except the passive role of victim. It was neither *in pari* nor in any *delicto.* We freely admit that it had a part, as a corporation, in the conspiracy of 1905 and in the conspiracy of May, 1909, to acquire the First National Bank of Fairbanks. But commission of one crime does not prove commission of another and later one. Nor does the commission of one tort prove the commission of a

later tort. The most that proof of prior offenses can show is a state of mind, intention, or a habit or system. But the only mind the corporation can have is the mind of its directors, officers and stockholders; and we admit that in the minds of the defendant stockholders the intent and habit of violating the Anti-Trust Act existed and persisted all the time. It existed in September, 1909, but on that occasion it manifested itself differently than on all prior occasions—it manifested itself, not in the corporate acts of the Washington Company, but in their personal, individual acts of selling their stockholdings in that company. Therefore, there was no delict *by* the corporation, though, as the sequel showed, there was a most serious one *against it.* As the Court of Appeals of New York said in the *North River Sugar Refining Company* case (9 L. R. A. 40):

> "If * * * the stockholders, * * * one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth and the entire and exact truth, it is difficult to see wherein the corporation has sinned."

Very difficult indeed! Nothing hinges, so far as this point is concerned, on the fact that the sale of stock herein was null and void. It is not the legality or illegality, the validity or invalidity, of that sale which controls, on this point. What controls is the *fact* that the defendants threw their corpora-

tion into the maw of the Moloch in this case, the Nevada Company. In the accomplishment of that fact the Washington Company had no part except the passive part of being the victim. Without any corporate action whatever on the part of their company, but purely by signing their personal names on the back of their stock-certificates, the defendants sacrificed their company. Their motive was not gain or advantage to their company but the quarter of a million dollars which they put, not into the company's vaults, but into their private purses. All of this appears upon the face of the complaint and is admitted by the demurrer.

While, as we have already stated, the proposition, that where the stockholders, directors or officers of a corporation cause it to do an *ultra vires* or wrongful act, it thereby becomes *in pari delicto* with them, has no bearing on this case, for here the corporation *did* no act, but *suffered* the act, yet counsel for the defendants may, in this Court, as they did in the Court below, assert that the corporation did an act, not merely suffered it. So let us consider their argument. Shutting our eyes for the nonce to the untruthfulness of their premise, and granting, for the sake of the argument only, that the corporation did an act *by and through the defendants,* namely, violated the Anti-Trust Law, then the question is whether, *as between the corporation and the defendants,* it is *in pari delicto with them.* The defendants say it is. We maintain it is not.

In the supposed state of the facts we freely admit

that *as to third parties,* injured by the act, the corporation as well as the defendants would be liable. In both of the cases above discussed, *State vs. Standard Oil Company* and *People v. North River Sugar Refining Company,* it was a third party who was complaining; namely, the State. But that is not the situation now under consideration. By the hypothesis we and the defendants have eliminated from view all third parties and limited our vision to the two parties here involved, the corporation and these defendants (its stockholders). As between them is there a *par delictum?*

It is not only perfectly possible but perfectly true that as between A and B, on the one hand, and C, on the other hand, both A and B may be liable to respond in damages or otherwise to C, and yet *as between A and B* the liability rests on A alone. That is a situation which occurs not infrequently.

A partnership may be rendered liable to third persons by the wrongful act of a partner, and thus another partner, himself unoffending, may be made to suffer. As to such third persons he, as a partner, is liable. But to a suit by him against the partner who acted wrongfully in creating the liability, the latter could not plead that the unoffending partner was *in pari delicto.* The common law on the subject is expressed in some of the codifications. Section 2431 of the Civil Code of California, for example, is as follows: "A partner is not bound by any act of a co-partner, in bad faith toward him, though within the scope of the partner's

powers, except in favor of persons who have in good faith parted with value in reliance upon such act." Briefly, as to third persons he may be liable, but as against the offending partner he may have a right of action. But we now turn to cases where the principle has been applied to corporations and their stockholders.

In *Hill v. Murphy*, 212 Mass. 1, a corporation, acting by its officers and directors, published a libel. The person libeled sued the corporation, recovered damages against it, and the corporation paid the judgment. Then, because the corporation (being under the control of said directors and officers) would not sue these officers and directors, certain stockholders instituted a suit, in right of the corporation, against both the directors and the corporation to recover *in behalf of the corporation* the damages which it had sustained; namely, the amount of the judgment and costs and the expenses it had been put to in defending the suit against itself. And the plaintiffs recovered judgment in right of and in behalf of the corporation. There it had been judicially determined that the corporation was liable to the third person, and in that sense was guilty, but as between it and the persons who had made it guilty it was held entitled to recover. (It is true that the suit was in equity, but it should be noticed that this was for no other reason than that the stockholders were forced by the circumstances to sue in right of and to the use of the corporation because of the failure and refusal of the corpora-

tion's officers to sue, and of course the corporation was a necessary party and could be brought in in no other way than as a party defendant; if the corporation itself had sued it would clearly have been an action at law, to-wit, trespass on the case.) The case came before the highest Court of Massachusetts in 1912 on bill, demurrer to the bill, answer, and an agreed statement of facts. The Court said:

> "*Clearly the bill sets out a cause of action in favor of the corporation against the defendant directors.* When directors intentionally act *ultra vires* of the corporation, they are liable for the losses it sustains in consequence. *Richardson v. Clinton Wall Trunk Manuf. Co.,* 181 Mass. 580. *Greenfield Savings Bank v. Abercrombie,* 211 Mass. 252, and cases cited. *Leeds Estate, Building & Investment Co. v. Shepherd,* 36 Ch. D. 787. *Williams v. McDonald,* 15 Stew. 392. *And regardless of whether the publishing of the libel was within the powers* of the corporation, the tortious act, alleged to be wilfully done by the directors *to gratify their own personal ends,* was a breach of the duty they owed as *quasi* trustees and it has resulted in loss to the corporation. The liability of directors is not limited to cases where the loss to the corporation results from fraudulent misconduct on their part, or where they have received financial profit which in equity belongs to the company. *Von Arnim v. American Tube Works,* 188 Mass. 515. *Greenfield Savings Bank v. Simons,* 133 Mass. 415."

The plaintiff in the libel case had also sued the directors but judgment in that suit had gone in favor of the directors. They pleaded that judgment in bar of the said suit by the stockholders in right of the corporation, but the Court held that the par-

ties and subject-matter were different and that the former judgment was therefore not a bar. The Court said (p. 4):

> "In that proceeding the question was whether the defendants were individually liable to Hill; in the present one the corporation seeks indemnity *for the damages it suffered due to the misuse of their powers by the defendants while acting as its directors.*"

And the Court gave judgment for the plaintiffs. So that after a judicial determination in one case that the corporation was liable for the libel, and a judgment in another case that the directors were not liable for it to the person libeled, *the directors were nevertheless,* in a third case, *held liable to the corporation for the damages it sustained by their causing it to publish the libel.* Thus this Massachusetts case has an element of weakness not present in the case at bar. For here there has been no judicial determination that the defendants were not personally guilty of violating the Anti-Trust Act. Indeed, by their demurrer they admit, for all present purposes, that personally they did violate it, and their theory that the corporation is in *pari delicto* also admits that they violated it.

(In reading this case of *Hill v. Murphy* the official report should be used because the last paragraph of the opinion is inaccurately stated in 98 N. E. 781 and the headnote in the latter report is correspondingly misleading.)

In *De Neufville v. New York etc. Ry. Co.,* 81 Fed. 10, in the United States Circuit Court of Ap-

peals for the Second Circuit, the complaint alleged that the plaintiff was a stockholder of the New York & Northern Railway Company, and that, in pursuance of a conspiracy of that company and the New York Central & Hudson River Railway, to throw the said Northern Company into the possession and control of the said Central & Hudson, the Northern Company refused freight from shippers and from other companies offering it, and thereby cut down its income to such an extent that it could not meet its bond obligations, with the result that the mortgage securing the bonds was foreclosed and the conspiracy was consummated by the Central & Hudson acquiring control through the foreclosure sale. It is clear that the Northern Company, *as a corporation,* was a party to the conspiracy to bring about its own insolvency, though it did not plot its own ruin till it fell into the hands of the majority stockholders and bondholders, who were interested in the Central & Hudson. The plaintiff had conceived that he had a right of action personally for the damages he sustained as a stockholder. The Court, however, held that the right of action was in the corporation, and that, since the corporation was controlled by interests hostile to the suit, the plaintiff, a stockholder, could maintain it in behalf of and to the use of the corporation. Said the Court (p. 12):

> "The bill sets forth a cause of action in favor of the New York & Northern Railway Company, which might be prosecuted either by it, or, if its directors failed to do their duty in that

> regard, then by one or more of its stockholders whose interest it is to have the corporation vindicate its rights."

The suit was for the restoration of the railroad property to the Northern Company and for an accounting. It seems that both the two corporations and the majority stockholders of the Northern Company were made defendants. It is very apparent that the Court did not consider the corporation *in pari delicto* with the majority stockholders, because it said (p. 12):

> "It is the property of the corporation which has been taken, and it is the corporation which is entitled to its return, or to an accounting for its proceeds."

And on p. 13:

> "The cause of action in favor of the corporation to recover its property being the only one supported by the facts pleaded in the bill, or cognizable by the court, and relief appropriate thereto being prayed for, the bill will not be dismissed as multifarious because complainant has also asked for other relief to which he may not be entitled.
>
> "There is no force to the suggestion that the bill is defective in failing to 'set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.' In view of the averments that *defendants obtained control of a majority of the stock and bonds* on purpose to wreck the New York & Northern; procured, by resignation and election, a board of directors in harmony with that purpose, and which board did in fact, by refusing profitable business and

> diverting traffic, accomplish such purpose—it would be an idle waste of time to urge the board of directors, or the majority stockholders who initiated and consummated the fraud, to bring suit in order to secure judicial condemnation of their own actions."

One of the strongest cases to be found illustrating the principle that a corporation is not *in pari delicto* with its wrongdoing stockholders, or persons in control of it, who thrust it into illegal action, is *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.,* 166 Fed. 254. That case was in the United States Circuit Court of Appeals for the Second Circuit, and is noteworthy in several respects: Firstly, like the case at bar, it was an action at law for triple damages under the seventh section of the federal Anti-Trust Act; secondly, the judge who wrote the opinion is acknowledged to be an authority on matters of corporation law and relations; thirdly, the defendants occupied the position held by the defendants in the case at bar, and they were represented by counsel most eminent in this branch of the law (and it is safe to assume that Mr. Johnson was assisted by Mr. John E. Parsons, since the latter was himself a defendant); fourthly, *by corporate action,* i. e., action taken by its board of directors as a board, the plaintiff company had participated in the conspiracy by which it complained it was injured. And the precise point on which the lower Court herein sustained the demurrer was presented and urged by counsel there, and overruled. The Court said (pp. 260-261):

"It is next contended that the complaint failed to show that the defendants did anything which was 'forbidden or declared to be unlawful' by the federal anti-trust statute. As already shown, however, the complaint charges that defendant combined and conspired to prevent the plaintiff from engaging in business and in interstate commerce; that they induced Segal to accept a loan from the American Sugar Refining Company and to pledge as security therefor a majority of the capital stock of the plaintiff corporation under such conditions that the American Company obtained the absolute voting power thereon; that the American Company used this power to elect directors favorable to the carrying out of the object of the conspiracy, and that such directors accomplished such object by voting that the plaintiff should not engage in business. The substance of the charge is that the defendants obtained the control of the plaintiff corporation to ruin it and to prevent it from ever becoming a competitor of the American Company, and that they carried out their unlawful purpose in violation of the trust imposed upon the majority stockholders for the benefit of the minority, and by inducing directors to be unfaithful in the performance of the duties of their office. In our opinion, the complaint sufficiently states a conspiracy in restraint of interstate trade and commerce within the meaning of the federal statutes. Indeed, no more effectual means to make a conspiracy effective could be devised than the manipulation, in the manner described in the complaint, of the control afforded by holding a majority stock interest—manipulation wholly in violation of the trust obligation of a majority stockholder to the minority and of the directors to all the stockholders.

"It is finally contended that, if the conspiracy was illegal, the plaintiff was a party to it, and

cannot maintain an action against the other parties. The answer to this contention is that *a corporation cannot conspire that its own directors shall be unfaithful to it.* Action which directors take in the name of their corporation, *detrimental to its interests and in bad faith,* is, with respect to them, the act of the corporation in name only. Directors and other persons entering into a conspiracy to obtain such action for wrongful and ulterior purposes are liable to the corporation for the damages caused thereby. Nothing is shown in this case to call for the application of the doctrine, '*In pari delicto potior est conditio defendentis.*' "

A corporation can no more conspire that its own stockholders shall be unfaithful to it than it can

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er of the Warwick Bank * * * to recover from the defendant, formerly president of the bank, under the money counts, the value of certain moneys and securities of the bank, by him appropriated to his own use."

[We see no see reason why the receiver might not, under the general rule, waive the tort, and pursue the defendant for so much money had and received to the use of the bank.]

"The case was tried before the Chief Justice, with a jury * * * when it appeared in substance that the defendant, who was the president, and his brother, John A. Kenyon, who was the cashier of the Warwick Bank, *being the owners of all but a very few of the shares* which

composed the capital stock of that bank of $25,000 only, sold out their interest in the bank to a company of persons from out of the State, for a bonus of $11,000, of which the defendant's share was $7,500, stipulating to receive, and receiving, all the valuable notes and checks of the bank, including their own, in payment for their stock and said bonus; the bank receiving in lieu thereof the notes of the purchasers.

* * *

"The presiding judge charged the jury * * * that in such a case, it could not be set up, in defence to the action of the receiver, that the bank was *in pari delicto* with the defendant."

In the Supreme Court the defendant's counsel urged as error that (p. 138):

> "The Court did not charge the jury, as requested, that if the transactions, involved in this suit, between the corporation and the defendant were illegal, and if the amount sought to be recovered had come into the possession of the defendant through such illegal transactions, that both parties were *in pari delicto,* and the plaintiff could not recover."

To this objection the Court said (pp. 143-144):

> "Again, it is objected that if the property of the bank came into the possession of the defendant in the course of an illegal transaction, that both parties are *in pari delicto,* and for that reason the plaintiff cannot recover * * *.
>
> "In this suit between a bank and its principal officer, for abstracting, without warrant or value, all its assets, it is difficult to see how the parties can be *in pari delicto*—how *the victim can be equally in fault with the officer, who, in breach of trust, has abstracted its funds.* In such a contest, the only moral agent,—when, in

> addition to this fraud, further fraud upon the public was designed,—was the officer, who was capable of reason as well as of discourse, and not the legal entity, whose interests he betrayed, and which was capable of neither. To talk about equality of wrong in such a case, would be, not only to shut our eyes to all *moral* distinctions, *but to the very nature of things*—both of which the common law is supposed to recognize."

Furthermore, the Court recognized the legal entity of the corporation, in consonance with the principle which we have urged hereinbefore. For, answering another objection of the defendant's counsel, the Court said (p. 142):

> "The second objection to the verdict, * * * wholly ignores *the existence of the bank as a legal entity,* created by law for certain purposes, possessed and required to be possessed of certain property and endowed with certain rights, to enable it to perform them, *and confounds the corporation with its creditors and corporators."*

The observation quoted by the lower Court from the case of *Bishop v. American Preservers Co.,* 105 Fed. 845, to the effect that the plaintiff in that case could not recover because he had been a party to the illegal agreement, does not in any degree or way countervail the decision in the *Pennsylvania Sugar Refining Company* case, for several reasons, among them being that the plaintiff there was an individual, not a corporation, and therefore the question could not and did not arise as to whether if a corporation is thrust by its stockholders into an illegal transaction and suffers damages therefrom, it can recover against them, and also that the plain-

tiff there entered the combination of his own free will.

## E

## The Right of Action for the Injury to the Washington Company Is in the Corporation, not in the Stockholders

Not content with arguing (1) that corporation and stockholders are identical, and (2) that they are not identical but different, and the corporation is *in pari delicto* with the stockholders, counsel for the defendants may argue here, as they did below, (3) that if *all* the stockholders had not participated in the illegal transaction of September, 1909, then the non-participating stockholders, not the corporation, could recover from the participating stockholders for the injury which the former suffered. That is, that the right of action, if there is one, is in the stockholders, not in the corporation. The lower Court adopted this view, for it says (tr. p. 65):

> "All the stockholders of this corporation, it is alleged, joined the combination. The receiver, then, represents no person who is directly interested who is not a party to the unlawful combination, and as such party to an illegal combination, cannot sue under the Sherman Act for damages which he has suffered."

But it has been held expressly and repeatedly that a stockholder cannot recover for the indirect damages which he sustains (through depreciation of the value of his stock) by injury to the business and property of the corporation resulting from a violation, by others, of the Anti-Trust Act. In

*Ames v. American T. & T. Co.,* 166 Fed. 820, 822, the Court said:

> "Assuming merely for purposes of decision upon demurrer that the declaration alleges a violation of the Sherman Act, and that it properly alleges consequent damage, I am of the opinion that the injury set forth *is to the corporation, for which the corporation alone can maintain an action* at law under the Sherman Act."

*Loeb v. Eastman Kodak Co.,* 183 Fed. 704, 709; *Corey v. Independent Ice Co.,* 207 Fed. 459, 460, and *United Copper Securities Co. v. Amalgamated Co.,* 223 Fed. 421, expressly follow the *Ames* case, all of them being attempts by a stockholder to recover in his own name the damages to his stock's value which he claimed he sustained from a combination in violation of the Sherman Act. And see *Converse v. United Shoe Machinery Co.,* 185 Mass. 422, 70 N. E. 444.

Now if the corporation alone can maintain the action it is because the corporation, and it only, is directly injured, and these cases expressly so state. Suppose that there were but one "innocent stockholder"; would the measure of damages which the corporation could recover be the amount that he had lost by depreciation of his stock or otherwise? Clearly not; it would be the total amount which the corporation, as such, had suffered. Then, on the hypothesis of the lower Court and of the defendants herein, the existence of just one innocent shareholder (holding, let us say, one share) makes the

total damages sustained by the corporation a reality. The non-existence of such a shareholder makes such damages sustained by the corporation an unreality. The very absurdity of this proposition refutes it. The truth is that the existence or non-existence of the "innocent stockholder" makes no difference as to the corporation's right to recover. It is not true that a corporation is an association of persons and nothing more. It is that and much more. It is a legal person with obligations not only to stockholders but to creditors. And while the creditors cannot force the corporation to sue for the wrong done to it in violation of the Sherman Act, and while when a receiver sues it is in right of the corporation, not in right of the creditors, yet that is not to say that the creditors have no rights or interests in the matter. From the nature of a corporation and the rule respecting paying creditors before stockholders, the creditors have not only as much right and interest in the action as stockholders, but their right is prior to that of the stockholder. The action is no more in right of the stockholders than of creditors. Neither class can maintain it in its own right. The right of action is the corporation's only. But whatever is recovered goes first to the creditors until their claims are satisfied, and only secondarily to stockholders. The truth is, that while neither class can sue in its own right, both have interests in the action brought in right of the corporation. In the *Ames* case, already mentioned, 166 Fed. 820, 823, the Court said:

> "The declaration alleges that the cable company is now in the hands of a receiver. It follows that upon recovery of damages for an injury to the corporation the fund belongs to the receiver for *application to the obligations of the corporation.* These obligations take precedence over the interest of the shareholder. The prior recovery by a shareholder, if permitted to diminish recovery by the receiver, would result in depriving creditors of the corporation, if there are any, of the assets properly belonging to them."

The attitude of the courts and the correct principles of law on this subject of creditors' rights in a corporation are illustrated by the opinion in *Jackson v. Ludeling,* 21 Wall. 616, 624. Justice Strong, speaking for the Court, said of officers of a company who had conspired with a single bondholder to cause a sale of a railroad property, under foreclosure, at a grossly inadequate sum, in fraud of the rights of other bondholders and stockholders:

> "As officers of the company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, *and also, to a considerable degree, of the bondholders,* owners of the mortgage. * * * They had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, *or even its bondholders.* Such a course was forbidden by their relation to the company. * * * They could not rightfully place themselves in a position in which their

> interests became adverse to those of either the stockholders *or bondholders.*"

The error of the lower Court lay in assuming that the stockholders are "directly interested," as the Court expressed it, while creditors are not (see tr. p. 65). Neither class is "directly interested," as that term is technically used in legal discussion—the *Ames* case and other cases cited above hold this flatly as regards stockholders—but the interest of the creditors is even more *proximate* than that of the stockholders. Can the stockholders come in and say that they are the only persons interested in a recovery, and that they all participated in the wrong, and that any recovery would be but taking money out of one pocket and putting it into another, and thus block all action by the corporation, notwithstanding that a whole class of persons ranks ahead of them in its right to be paid by the corporation? We submit that the stockholders cannot do this. The corporation being a legal person with obligations first to class A and secondly to class B, said class B, when sued for a wrong done to the corporation, will not be heard to say, "The recovery would be for our benefit, would be taking money away from us and then paying it back to us, and the Court will not do such a useless thing." They will not be heard to say that, because it is fundamentally untrue. *If it were true, the defendants herein would not seriously object to this action.* They would not strenuously resist paying money into court if it were to be paid right back to them.

The defendants have assumed one innocent stockholder, in arguing this matter in the lower Court. Let us assume *all* the stockholders innocent *except one.* That one, with outside persons, enters into a conspiracy in restraint of trade and commerce, through and by which conspiracy his company is injured. Will the fact that he is a stockholder, and therefore will himself share, *as such,* in the benefits of a recovery against himself, keep his company from having a valid right of action against him? Suppose now, that he owns a majority of the stock in his company, will not the company still have a right of action against him? Let us alter the supposition. Suppose that instead of there being but one guilty stockholder, the majority of the stockholders entered into the unlawful conspiracy, will that fact preclude a recovery? Certainly not; and no more will the fact that all of the shareholders, to benefit some alien or ulterior private interest of their own, enter into the conspiracy. The corporation as such is as much injured as if only one shareholder, holding but one share, were guilty of participating in the conspiracy. The interests of the shareholders, as such, receive the same indirect injury through the injury to the corporation, when all are guilty of the conspiracy as when one only is guilty, notwithstanding that some other and alien interest of the shareholders is benefited. It may be that all of them are interested in two companies, A and B. It may be that it is to their private interest as holders of B's stock that A be destroyed. They may enter into a conspiracy with

other persons to destroy A, and actually destroy it, in violation of the Sherman Law. They may be made the richer thereby. But their interest, as owners of A's stock, has been injured, and A has been ruined, nevertheless. And corporation A has a right of action against them for it is a legal entity, a legal person, separate and apart from them, a focus or center of rights and liabilities, including other liabilities than those to the stockholders and including other rights than those against non-stockholders. To say that if an outsider does a certain thing he is liable under section 7 of the Sherman Law, and that if one, or a majority, or all but one, of the stockholders do that same thing they are similarly liable, but that if all of the stockholders do that identical thing not one of them is liable under that section, is, we submit, a preposterous assertion.

## F

## The Intention of the Defendants Included the Intent to Destroy the Washington Company

We cannot leave this branch of the case without discussing briefly the lower Court's remarks (tr. p. 67) regarding the purposes of the conspirators. In the first place, it is apparent on the face of those remarks, as almost everywhere else in the opinion, that the Court did not distinguish the conspiracy of September, 1909, from the earlier ones. If the Court's statements had been confined and applied to the original conspiracy of 1905, they would, in the main, be true. But they become, we respect-

fully submit, irony and mockery when applied to the facts of the conspiracy of September, 1909. Viewed in the light of the allegations of the complaint, admitted by the demurrer, that "said Nevada Company, with the knowledge and consent of the defendants herein, and each of them, took from the said Washington Company all of its assets and dissipated, wasted and converted the same, which assets have never been, in part or in whole, repaid or restored to the said Washington Company" (tr. p. 36), it seems ironical indeed to say, "the business was operated with a view to enhancing the earnings, and the Washington Company was not depressed nor discriminated against, but *was given the business consideration of the conspiring bank which acquired the stock.* It does not appear that the failure of the banks, or either of them, was caused by the conspiracy, but rather, in spite of it." And, "It would appear that the purpose of the conspiracy was against the public and not against either of the corporations" (tr. p. 67).

The defendants admit by their demurrer that, so far as they could, they sold their stock to the Nevada Company (tr. pp. 24-29); that they knew the Nevada Company was grossly insolvent at the time (tr. p. 33); that they surrendered the offices and trusteeships of the Washington Company to appointees of the Nevada Company (tr. p. 35); and that then the Nevada Company, with the knowledge and consent of every one of the defendants herein, took, dissipated, wasted and converted all the assets of

the Washington Company (tr. p. 36). And all this was done, they admit, in pursuance of a conspiracy to limit, restrain, and control the banking business at Fairbanks and environs. By these admissions they admit that it was a part of their intention that the Washington Company should thus be despoiled and pillaged. Of course the "purpose" of the defendants and the owners of the Nevada Company was to make money or get hold of it by some means or other. That is the purpose of the highway robber also. But the full scope of any purpose or intention includes all the means designed and intended to accomplish that purpose. It was the purpose and intention of the defendants to ruin the Washington Company just as truly as it is the purpose and intention of the highwayman to use the means which he employs to get money. Even if the defendants had not admitted by their demurrer that it was with their knowledge and consent that the Nevada Company took and converted the Washington Company's assets, they would be liable for the losses which their company sustained, because they deliberately turned it over to another company which was insolvent, and therefore irresponsible. It was a wrongful, unlawful act to permit *any* other company thus to obtain control of their company.

The defendants have by their demurrer admitted the allegations of the complaint that the surrender of their corporation to the Nevada Company proceeded from wrongful and unlawful motives and purposes, but apart from such admission the very

act itself speaks and declares that the intent was to place the Washington Company in the entire control of the Nevada Company so that the latter might do therewith as it chose. The act itself therefore proclaims the wrongfulness and illegality of the transaction.

> *Anglo-American Land etc. Co. v. Lombard,* 132 Fed. 721, 736;
> *Caffrey v. Darby,* 6 Ves. 496;
> *Cocker v. Quayle,* 1 R. & M. 535;
> *Fyler v. Fyler*, 3 Beav. 568;
> *Kellaway v. Johnson,* 5 Beav. 324;
> *Munch v. Cockerell,* 5 M. & Cr. 212;
> *Gibbons v. Taylor,* 22 Beav. 344;
> 2 Lewin on Trusts, *p. 907.

True, these cases were in equity, but the forum wherein it is enforced neither adds to nor subtracts from the principle of law here involved. Nor are the defendants saved from liability by the fact that it was the Nevada Company which, with the defendants' knowledge and consent, pillaged the Washington Company. The whole scheme contemplated this, because it was a natural and probable consequence of the defendants' surrendering control of their company to another company, and therefore the defendants are liable for the resultant damage. For that the agency which wreaks the damage is human, not inanimate, does not free the defendants from liability where the action of that agency is made possible, natural and probable by

the acts of the defendants. In *Anglo-American Land etc. Co. v. Lombard,* just cited, the Court said:

> "Where it is not otherwise provided, the implication in a grant of corporate power and life is that the corporation shall exercise its powers and carry on its business through its own officers and employees, and not indirectly, through another corporation operated under its control, and that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its powers to another corporation. Conceding that a corporation of a private character, not charged with any public duties, may, in pursuance of appropriate action on the part of its stockholders, sell all of its property, wind up its affairs, and permanently retire from business, still, in the absence of express authorization, neither the corporation *nor its stockholders* can, incidental to the sale of its property *or otherwise,* clothe another corporation with the right to maintain the corporate life or exercise the corporate powers."

In *Angle v. Chicago etc. Ry.,* 151 U. S. 1, 14, Justice Brewer, delivering the Court's opinion, quotes approvingly from Lord Justice Brett's opinion in *Bowen v. Hall,* 6 Q. B. D. 333, 337, as follows:

> "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White.* If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act

> complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him."

As was said by the New York Court of Appeals in *Bosworth v. Allen,* 168 N. Y. 157, 61 N. E. 163, 165:

> "The loss of money by the corporation subsequent to the conspiracy, and in consequence thereof, through the wrongful acts of the defendants' successors, placed in office by their treachery, was the natural, and therefore the expected, result of the conspiracy itself."

As to the intent to limit, restrict and control the banking business at Fairbanks and environs, that is specifically alleged in the complaint (tr. pp. 8-9, 22, 24-25), and is therefore admitted by the demurrer; but, if that intent were not thus admitted, the admission of the other facts pleaded respecting gathering the banking business into the hands of the Nevada Company solely would be an admission of that intent for all present purposes. It was held in *Standard Oil Co. v. United States,* 221 U. S. 1, 75, that

> " * * * the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, *in and of itself,* in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over

> the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed."

Apart from the specific intent to restrain the banking business, charged against the defendants, the direct, natural and necessary tendency of the *acts* charged against them, and admitted by the demurrer, was illegally to restrain the business of banking within the region described in the complaint. And where such is the direct, natural and necessary tendency of acts, the Anti-Trust Law is violated, as the courts have repeatedly held.

*Standard Oil Co. v. United States,* 221 U. S. 1;

*Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 234;

*Standard Sanitary etc. Co. v. United States,* 226 U. S. 20;

*United States v. Trans-Missouri Freight Assn.,* 166 U. S. 290;

*Bigelow v. Calumet & H. M. Co.,* 167 Fed. 704, 167 Fed. 721.

**Conclusions Deduced from Foregoing Argument and Authorities**

We submit that the inevitable conclusions from the authorities and the allegations of the complaint are:

(1) That the conspiracy of September, 1909, was

separate and distinct from the earlier conspiracy of 1905 and from that of May, 1909;

(2) That the Washington Company had no part in the conspiracy of September, 1909, except the passive part of victim;

(3) That the Washington Company is an entity separate and distinct from its stockholders, the defendants;

(4) That a court will never consider corporation and stockholders identical except to prevent wrong or fraud, and then only for the purpose of holding the corporation, as such, liable; never for the purpose of freeing the stockholders from liability;

(5) That even if all the conspiracies alleged in the complaint, including that of September, 1909, were considered as but one continuing conspiracy, and thus the Washington Company, even with reference to the transactions of September, 1909, and subsequently, became a violator of the Anti-Trust Act, it would be such violator thereof with reference to third persons only (the Federal Government, the Territory of Alaska, the State of Washington, the depositors and customers of each one of the banks)—it would not be such violator where the question is narrowed down so as to lie between the Washington Company and its own stockholders and directors—and that is where the question does lie in this case—as between *them* the stockholders and directors alone are guilty of violation of the law;

(6) By their demurrer the defendants have admitted a specific intent to violate the Anti-Trust

Law; but if they had not admitted such specific intent, their admission of the commission of the acts charged in the complaint is an admission for all present purposes of such intent, for not only was the direct, natural and necessary result of those acts to infringe that Law, but they did in and of themselves infringe it to the damage of the Washington Company, as is alleged in the complaint.

Therefore, the complaint states a cause of action against these defendants.

## II.

### *This Action Was Commenced Within the Time Limited by Law*

The other ground on which the Court below sustained the demurrer to the complaint was that the action was not commenced within the time limited by law (tr. pp. 67-71). We respectfully submit that therein the Court erred.

### A

### **The Statute of Limitations Governing the Action Is That of the State of Washington**

It is thoroughly settled that there is no statute of the United States fixing a limitation on actions under Section 7 of the Anti-Trust Act. Therefore, the case is governed by the statute of limitations of the state of the forum—Washington.

> *U. S. Rev. Stat.*, sec. 721;
>
> *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397;

*Atlanta v. Chattanooga Foundry,* 101 Fed. 900, 902, 904, 906, 910;

*Atlanta v. Chattanooga Foundry,* 127 Fed. 23, 28, 29;

*Campbell v. Haverhill,* 155 U. S. 610;

*Brady v. Daly,* 175 U. S. 148.

Such portions of the statute of limitations as might possibly be considered to have a bearing on this action, to-wit, sections or portions of sections 155, 159 and 165 of Remington & Ballinger's Annotated Codes and Statutes of Washington, are in the words following:

> "§155. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer."

> "§159. Within three years,—
>
> * * * * * * * *
>
> "2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
>
> * * * * * * * *
>
> "4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
>
> * * * * * * * *
>
> "6. An action upon a statute for penalty or forfeiture, where an action is given to the party

aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty [limitation]."

"§165. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

The lower Court said (tr. p. 68):

"I think this case comes within subdivision 6 of Section 159, Remington & Ballinger's Statutes of Washington, which provides that, 'An action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State * * *,' shall be commenced within three years. This is clearly an action for a penalty."

There is an obvious difficulty about the lower Court's view of the matter. If this action is for a penalty, then sections 721 and 1047 of the Revised Statutes of the United States grip it and take it from the control of *any* state statute of limitations whatever. Said federal section 1047 would then apply and the limitation would be five years. But it has been distinctly held by the highest authority that actions under section 7 of the Anti-Trust Law are not for a penalty, but are remedial. Such actions are simply civil remedies for private injury, and the damages recovered are compensatory and exemplary.

*Chattanooga Foundry v. Atlanta,* 203 U. S. 390, 397;
*Strout v. United Shoe Machinery Co.,* 195 Fed. 313, 317;
Noyes on Intercorporate Relations, §410.

In *Chattanooga Foundry v. Atlanta,* just cited,

Justice Holmes, who delivered the Court's opinion, said:

> "The limitation of five years in Rev. Stat. sec. 1047, to 'any suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States,' does not apply. The construction of the phrase 'suit for a penalty,' and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington v. Attrill,* 146 U. S. 657, 668; *Brady v. Daly,* 175 U. S. 148, 155, 156."

These cases of *Huntington v. Attrill* and *Brady v. Daly* show clearly why actions such as the action at bar are not penal.

In *Strout v. United Shoe Machinery Co.,* just cited, the Court said:

> "Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages."

In view of the unequivocal ruling of the Supreme Court of the United States in the *Chattanooga Foundry* case, quoted above, and of the thorough and convincing discussion of the nature of a penal action which occurs in the cases of *Huntington v. Attrill* and *Brady v. Daly,* cited by Justice Holmes, we would not be justified in dwelling longer on this

point. With all respect to the lower Court we must conclude that this action is not penal in nature and subdivision 6 of section 159 does not control it.

But it is sufficient for our immediate purposes to have it settled that one of the limitations prescribed by the State statute does apply. This is fully settled by the above authorities. And we will defer a detailed examination of the sections of the Washington statute above quoted until we shall have considered features of the case at bar, which, we firmly contend, bring the date of the commencement of this action well within the shortest period named in those sections—two years.

The complaint charges that in pursuance of a conspiracy to restrain trade and commerce in a territory by concentrating, limiting and controlling the banking business at Fairbanks and environs, the Washington Company, and its business, assets, property, and apparently its identity, were turned over to and sunk in the Nevada Company, (1) by the act of the defendants in "selling" their stock in the former company to the latter company, (2) by the act of the defendants in surrendering the directorate of the Washington Company to the Nevada Company's appointees (tr. pp. 25-26, 35-36), (3) by the managing and active stockholders, directors and officers of the Washington Company agreeing not to start any other or new bank, or affiliate with any competing bank, at Fairbanks or in that region (tr. pp. 30-32), and (4) by means of a pretended consolidation of the two companies, and a change of

name of the Nevada Company by which it took and assumed the name of the Washington Company (tr. pp. 37-38); each and all of these things being done by the action or with the participation or with the active consent and approval of the defendants, and each of them; and as a result thereof all of the assets of the Washington Company were taken, dissipated, wasted and converted by the Nevada Company (tr. p. 36).

The complaint further alleges that the pretended consolidated concern closed its doors, and that the Court in Alaska, being deceived by the defendants' conduct into believing that the Washington Company had lost its identity in the Nevada Company (and all others with any possible interest in the matter, except the defendants and their co-conspirators, being likewise deceived), appointed a receiver for the Nevada Company only; and it was not until 1915 that it was discovered that the Washington Company had not lost its identity or been merged in the Nevada Company but was a subsisting corporation, with rights and liabilities, and, consequently, it was not till that year that a receiver was appointed for the Washington Company and that its affairs were disentangled, so far as possible, from those of the Nevada Company (tr. pp. 38-45).

Notwithstanding that the books and papers of the Washington Company came into the hands of the person who was appointed receiver of the Nevada Company in 1911 and continued in his hands until 1915, the said receiver of the Nevada Company had

absolutely no legal power, right or authority in any way to represent or sue for the Washington Company; and it is apparent, therefore, on the face of the complaint that at all times from 1909 until 1915 the Washington Company was under the complete domination of the defendants and their co-conspirators and that it had absolutely no representative who *could* sue in its behalf or enter suit in its name except the defendants themselves, and, further, that during all of that time the conduct of the defendants themselves prevented the appointment of anyone—prevented accession of anyone to the control of the corporation—who could have sued in behalf of the corporation or in its name.

From these facts several principles emerge for consideration: (1) Notice to or the knowledge of a stockholder, director or officer of a corporation while not engaged in and about the business of the corporation, is not notice to or the knowledge of the corporation itself; (2) a corporation is not charged with notice or knowledge of facts of which a stockholder, director or officer has notice or knowledge, where the transaction is one in which the stockholder, director or officer is acting adversely to the corporation; and if the transaction gives rise to a cause of action in favor of the corporation and against such stockholder, director or officer, the statute of limitations does not run against such cause of action so long as the corporation remains under the domination or control of such stockholder, director or officer, or of those who are in like interest with

him; (3) where a disability to sue occurs (whether that disability arises out of inability, imposed by a superior power, on the part of the plaintiff to act, or out of his inability, imposed by a superior power, to reach the defendant by suit), the statute of limitations does not run until the disability is removed; (4) and where such disability has been caused by one against whom the cause of action existed, or where the latter by any conduct induced or caused a withholding or postponement of suit, he is estopped to say that the statute of limitations ran during the time the disability existed or the suit was withheld.

## B

### Unless a Transaction Is in and About a Corporation's Business, Notice to or Knowledge of a Stockholder, Director or Officer, Is Not Notice to or the Knowledge of the Corporation.

The "sale" of their stock by the defendants was their private transaction. The corporation, by the transfer of the stock on its books, would have been charged with notice that there *was a transfer* of the stock from one person to another, if it had not been for the operation of principle (2) above stated; to-wit, that a corporation is not so charged where the transaction is intentionally adverse to its interests. But even if it were charged with notice of such transfer, it is clear that notice or knowledge of the motives and purposes actuating the defendants in that stock transaction cannot be imputed to it. Those motives and purposes were the personal, priv-

ate designs of the defendants—their design and desire to obtain for their shareholdings two and one-half times the real value thereof, and at the same time to concentrate the banking business in the hands of the Nevada Company by permitting and facilitating the absorption of the Washington Company and its assets into the Nevada Company. For the distinction between action by a stockholder *qua* stockholder and action by him in his private capacity we refer back to pages 19-28 of this brief and the citations and quotations there given. Where the transaction is that of the stockholder in his private capacity, not *qua* stockholder, the corporation is not chargeable with notice or knowledge of any wrongfulness, unlawfulness, defect or invalidity infecting the transaction.

> *Reid v. Bank of Mobile,* 70 Ala. 199, 211;
> *Penfield Inv. Co. v. Bruce,* 132 Mo. App. 257, 111 S. W. 888;
> *Gregmore Orchard Co. v. Gilmour,* 159 Mo. App. 204, 213-214, 140 S. W. 763;
> *Lanning v. Johnson,* 75 N. J. L. 259, 69 Atl. 490;
> *Keenan v. Dubuque etc. Ins. Co.,* 13 Iowa 375;
> *Mercier v. Canonge,* 8 La. Ann. 37;
> *General Ins. Co. v. United States Ins. Co.,* 10 Md. 517, 69 Am. Dec. 174;
> *Custer v. Tompkins,* 9 Pa. St. 27;
> *In re Plankinton Bank,* 87 Wis. 378, 58 N. W. 784;

*Davis etc. Wheel Co. v. Davis etc. Wagon Co.,* 20 Fed. 699;
*Reed v. Munn,* 148 Fed. 737, 755;
Angell & Ames on Corp., §307.

A closely cognate principle is that the knowledge or notice of its officer or agent is not imputed to a corporation except in those matters which are within the scope of his authority, and which it is the agent's duty to communicate to his principal.

*Schwabacher Bros. & Co. v. Murphine,* 74 Wash. 388, 133 Pac. 598;
*Moon Bros. Carriage Co. v. Devenish,* 42 Wash. 415, 85 Pac. 17;
*Corbet v. Waller,* 27 Wash. 242, 67 Pac. 567;
*Robertson Lumber Co. v. Anderson,* 96 Minn. 527, 105 N. W. 972;
*Luling etc. Co. v. Lane etc. Co.,* 49 Tex. Civ. App. 534, 109 S. W. 445;
Mechem on Agency, §§718, 719;
Story on Agency, §140;
Angell & Ames on Corp. §309.

Here it cannot possibly be said that the "sale" of the stock by these defendants or the "consolidation" or the turning over of the Washington Company's assets to the Nevada Company, or any of those transactions, were at all within the business of the Washington Company; therefore, they could not be within the scope of the authority of the defendants considered as its agents.

## C

**Where the Stockholders, Directors or Officers, Are Acting Adversely to the Corporation, Knowledge or Notice Which They Possess Is Not Imputable to It; and If Their Acts Give a Right of Action in Favor of the Corporation Against Them, Time Does Not Run Against Such Right of Action so Long as They or Those in Like Interest Remain in Control of the Corporation.**

Even if the "sale" of the stock had been in and about the business of the Washington Company—had been a corporate matter—the knowledge and notice of the defendants, its stockholders, directors and officers that it was a null and void transaction would not have been imputable to the company for the very reason that it was intended, calculated and adapted, as the complaint in effect charges, to defraud the Washington Company. This statement applies in full measure also to the "consolidation" and to the actual absorption and conversion of the Washington Company's money and assets by the Nevada Company. For in and during all of these transactions, since every one of the corporation's directors, officers and stockholders was party to the plot and fraud, the corporation had no one connected with it in any capacity notice to or knowledge of whom would affect it. They and all their acts were hostile to it and its interests; they were seeking to destroy its identity, its corporate life; neither their acts nor knowledge of their acts, nor notice of the purposes and ends inspiring those acts, can be imputed to the Washington Company. And until

someone came into control of the company who could sue, time did not run against the cause of action which those acts gave rise to in favor of the corporation. The rule that ignorance of the existence of a cause of action does not toll the statute has no application here; a corporation has no mind, no intelligence apart from its agents, and this rule does not apply where the very agents or minds through and by whom *alone* the plaintiff could know of the existence of the cause of action have turned against the plaintiff and are themselves the defendants.

> *In re Fitzroy Bessemer Steel etc. Co.,* 50 Law Times (N. S.) 144;
> *Coxe v. Huntsville Gas Light Co.,* 106 Ala. 373, 17 So. 626, 627;
> *American Surety Co. v. Pauly,* 170 U. S. 133, 156;
> *High v. Opalite Tile Co.,* 184 Fed. 450;
> *In re Senoia Duck Mills,* 193 Fed. 711;
> *Oregon etc. Co. v. Grubissich,* 206 Fed. 577;
> *Davis etc. Wheel Co. v. Davis etc. Wagon Co.,* 20 Fed. 699;
> *Levy & Cohn Mule Co. v. Kauffman,* 114 Fed. 170;
> *Whittle v. Vanderbilt M. & M. Co.,* 83 Fed. 48;
> *Brooklyn Distilling Co. v. Standard D. & D. Co.,* 105 N. Y. S. 264, 267;
> Same Case, on Appeal, 193 N. Y. 551, 86 N. E. 564;

*Benedict v. Arnoux,* 154 N. Y. 715, 49 N. E. 326;

*United Security etc. Co. v. Central Nat. Bank,* 185 Pa. St. 586, 40 Atl. 97;

*Seaverns v. Presbyterian Hospital,* 173 Ill. 414, 50 N. E. 1079;

*Johnston v. Shortridge,* 93 Mo. 227, 6 S. W. 64;

*First National Bank v. Christopher,* 40 N. J. L. 435;

*Stevenson v. Bay City,* 26 Mich. 44;

*Wickersham & Keith v. Chicago Zinc Co.,* 18 Kan. 481.

Of course it is the rule that in a court of law the directors and officers of a corporation are viewed as agents and the corporation as the principal. And the law is thus stated in *American Surety Co. v. Pauly,* cited above, where the extent to which a corporation was bound by its officer's knowledge was under discussion:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, *but to subserve simply his own personal ends or to commit some fraud against the principal.*"

In *Davis etc. Wheel Co. v. Davis etc. Wagon Co.,* 20 Fed. 699, the Messrs. Davis had sold their inventions to the defendant corporation, but afterwards,

with several other persons, organized another company, to-wit, the complainant, and sold the same inventions to it. The question was whether the complainant corporation was charged with notice of the prior sale. The Court said (p. 701):

> "There is no evidence here to show what took place between the Davises and the other directors or officers of the complainant in regard to the purchase of the inventions, or whether the Davises took any official part in the transaction which resulted in the issuing of the letters patent to the complainant. The defendant relies on the mere fact that they were directors when the corporation derived its title, and insists that this circumstance alone is notice to the corporation of the infirmity of the title it obtained. This is not enough. It cannot be assumed that they participated as directors when they were representing their own interests as parties contracting with the corporation; and it would be most unreasonable to charge the corporation with notice of facts within their knowledge, but which it was not for their interest to communicate to the officers or to their co-directors. They were selling to the complainant what they had already sold to another, and, if they had communicated the facts, the corporation would have purchased only a worthless title. If they had imparted their knowledge to the other directors or officers they would have defeated the object in view. The general rule which charges a principal with the knowledge of his agent is founded on the presumption that the agent will communicate what it is his principal's interest to know and the agent's duty to impart. In the language of Mr. Justice Bradley, the rule 'is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting

> the subject-matter of the negotiation, and the presumption that he will perform that duty.' The *Distilled Spirits,* 11 Wall. 367. * * * Accordingly, it has been repeatedly adjudged that a corporation will not be charged by the knowledge of a director in a transaction in which the director is acting for himself, because he represents his own interests, and not those of the corporation."

In *High v. Opalite Tile Co.,* 184 Fed. 450, in the United States Circuit Court of Appeals, Third Circuit, the facts were as follows: Carter owned the great majority of the stock of the Mirick Company and was its president and manager. He was also vice-president and manager of the defendant Tile Company. Through his management the Mirick Company became indebted to the Tile Company for tile bought and money advanced. The advances from the Tile Company were unauthorized by its directors and fraudulent. Later the Mirick Company repaid most of these moneys, then became bankrupt. The trustee in bankruptcy sued for a return of the money thus paid back to the Tile Company, as an unlawful preference. The question was whether when the Tile Company received the money back it "had reasonable cause to believe that it was intended thereby to give a preference," within the meaning of the bankruptcy act. The Court said (p. 451):

> "The advances which Carter made to the bankrupt company out of the funds of the defendant company were clearly unauthorized and fraudulent. As he owned practically all the capital stock of the bankrupt company, the advances were in his own interest, and opposed to

the interest of the defendant company. * * * No officer or agent of the defendant company, except Carter, had any actual knowledge of these cash transactions. In his opinion the learned District Judge said:

"'Carter was therefore in the position of having taken the money of the defendant company, of which he was an officer, and of having appropriated it to the Mirick Company, of which he was president. He was therefore standing in an antagonistic relation to his principal, the defendant company, and his conduct raises the clear presumption that he would not communicate the fact of his misappropriation of his principal's money to it, but when he found his company insolvent he would attempt to restore the defendant's money to it; the motive being to escape the criminal consequences of his embezzlement of the funds of the defendant company. Therefore in making the payment Carter was clearly acting for himself, and not for the defendant company, and his knowledge of the insolvency would not be the knowledge of the defendant company, and his intention to prefer the defendant company cannot be attributable to that company.'

"This statement is in accord with *Lilly v. Hamilton Bank,* 178 Fed. 53, 102 C. C. A. 1, and many other cases that might be cited. The knowledge of Carter was not imputable to the defendant company."

In *Oregon etc. Co. v. Grubissich,* 206 Fed. 577, decided by this Court in 1913, Judge Gilbert quotes approvingly from *McCaskill v. United States,* 216 U. S. 504, 514, as follows:

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders or officers. It may have interest distinct from theirs. Their interests, it may be

conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse their knowledge will not be attributed to it."

The case of *Brooklyn Distilling Co. v. Standard D. & D. Co.,* 105 N. Y. S. 264, is instructive in this connection. The plaintiff corporation leased its distillery to the defendant corporation, which was organized for the purpose of creating a monopoly in alcohol and spirituous liquors. Plaintiff's president, who was interested in defendant, knew of the illegal purpose for which defendant was organized and which induced it to take the lease. The defendant company paid rent for a time and then refused to either pay rent or surrender possession. The action was for the rent. The defendant company set up the illegality of the contract, alleging it was intended to give the defendant company a monopoly. Both the Appellate Division of the Supreme Court and the Court of Appeals of New York held that under the rule, that where the agent is engaged in doing an act against his principal's interest his knowledge will not be imputed to the principal, the knowledge of the plaintiff's president would not be imputed to the plaintiff corporation. The Appellate Division said (p. 267):

"The foregoing discussion has been upon the assumption that the plaintiff knew the illegal purpose for which the defendant was formed and which induced it to make the lease in question. * * * The only evidence bearing on that

subject is that Matthiessen, its president (since deceased), had that knowledge, and it is claimed that the knowledge which he had is to be imputed to his principal. This is the general rule; *but it does not apply where the agent is engaged in doing an act against his principal's interest. Benedict v. Arnoux,* 154 N. Y. 715, 49 N. E. 326. It is undisputed that Matthiessen was largely interested in the defendant company. He was one of its promoters, directors, and a member of its executive committee. Appellant insists that in the negotiations which resulted in the execution of the lease Matthiessen acted, not in the interest of the defendant, but in the interest of the plaintiff, and therefore his knowledge must be imputed to the plaintiff, and yet it is insisted that the lease procured by Matthiessen is void, for which reason defendant cannot be compelled to pay the rent stipulated. If the lease were illegal and void, Matthiessen must have known it because he is presumed to have known the law, and, if he induced the plaintiff to execute it, knowing it to be void and unenforceable against defendant, being himself personally interested in the defendant, it cannot be said he was acting in the interest of the plaintiff. Either the lease is valid, in which case it is immaterial for whom Matthiessen acted, or else it is invalid because made for an illegal purpose. If the latter, it was made against the interest of the plaintiff * * * ."

And the Court of Appeals of New York, 86 N. E. 564, 565, in an unanimous opinion, said:

"Assuming that the scheme in aid of which the defendant corporation procured this lease was a combination in restraint of trade, was Mr. Matthiessen's knowledge of its nature imputable to the lessor under the circumstances? We think that this question must be answered in the negative, and that the defendant's appeal must,

> therefore, fail. The case clearly falls within the doctrine declared by this court in *Benedict v. Arnoux* (154 N. Y. 715, 728), where it was held that *when an agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent* acting in good faith for his principal * * * . It is plain from the findings that what Mr. Matthiessen had at heart were the interests of the lessee in opposition to those of the lessor. His information, therefore, to the effect that the lessee's purpose was an unlawful one, assuming it to have been such, did not charge the lessor with knowledge of the fact."

The facts *In re The Fitzroy Bessemer Steel Co.*, 50 Law Times (N. S.) 144, decided by Justice Kay in 1884, were as follows: Smith, a promoter, and subsequently a director, of the steel company, made an arrangement with the syndicate of vendors of a mine by which he was to receive 1000 B shares in the company in consideration of his taking or placing 500 A shares. He subsequently received the 1000 B shares. Notice of this transaction was, after the formation of the company, given to the directors by means of a letter from the solicitors of certain shareholders, *but the board which received the notice consisted of persons more or less implicated in the transaction,* and no action was taken in the matter. The company was afterwards wound up and the liquidator brought suit to recover from Smith the value of the 1000 B shares, on the ground that his having received them was, under the circumstances,

a misfeasance as against the company. It was contended by Smith's counsel that the suit was barred by the statute of limitations because of the company having, through its directors, received notice of the transaction more than six years previously. The Court said:

> "Now, I assume, and I think it is so, that the letter to the chairman gave sufficient information of the misfeasance of Mr. Samuel Smith, and, according to the case I have mentioned, laying that letter before the board would *prima facie* be notice to the company. But was it, in fact, such notice? The directors present at the meeting on the 4th June [when the letter was read to the board] were Messrs. Dyer and McLagan, and Colonel Holland. McLagan and Holland were two members of the syndicate who had made this arrangement to hand the 1000 B shares to Mr. Samuel Smith, and were the trustees of these shares under that arrangement, and Dyer was a director whose qualification had been provided for him by an arrangement not very dissimilar. Notice to an agent is not notice to the principal where it would be quite certain that the agent would not disclose the matter, and here it seems to me ridiculous to suppose that a board so constituted would make any such disclosure. The minutes of that meeting were read and confirmed at a subsequent meeting, at which the same directors and one other were present, but the letter was not read at that meeting. *I therefore reject the defense of the Statute of Limitations in this case because the respondent has not proved that the company had notice of the facts six years before this summons was taken out.*"

In *Coxe v. Huntsville Gas Light Co.,* 106 Ala. 373, 17 So. 626, 627, a company sued its president for an

accounting, and the statute of limitations was pleaded in defense. The Court said:

> "The bill avers that he was its president, that he governed and controlled its management, and received and disbursed all its moneys, kept its books, and withheld them from the directors, and by evasion, deception and refusal, prevented an examination, until but recently, before the filing of the bill, when, for the first time, it was ascertained, that he was illegally and wrongfully absorbing the income for his own emolument, by improper and unauthorized credits. We are satisfied from the evidence that a failure to examine the books in the year 1878, *was due to his own conduct and representations,* and that the directors were lulled into a feeling of security by his representations as to the condition of the corporate affairs. We are of opinion that he occupied a fiduciary relation, partaking sufficiently of the nature of a trustee, to require him to deal fairly and openly with the corporation and directors in all his fiduciary duties; and in so far as they were lulled into non-action, from a reliance upon his statements, and his failure to disclose the fact that he was claiming credits not authorized by the directors, of which he knew they were ignorant, he cannot escape liability under the shelter of the statute of limitations."

Mechem, in his work on Agency, second edition, §1347, says:

> "The purpose of the statute of limitations in these cases is to protect the agent against the assertion of stale claims, but it ought not to be made the means of screening a guilty agent, by allowing him to set it up as a defense, *where the agent's own fault furnishes the cause of action, and the principal had no knowledge or means of knowledge that such a default had occurred.*

Where the agent * * * has been guilty of some misapplication or misappropriation of money or property which the principal had no reason to anticipate or suspect, it sounds very ill in the agent's mouth to plead the statute of limitations against the principal, until after the principal has learned of the wrong. To allow this is to sacrifice the principal to the guilty agent. The agent does not stand upon the same footing as a stranger. He is a person relied upon. He owes a duty. He is not dealing at arm's length. He disarms the ordinary diligence and watchfulness of the principal by undertaking to protect his interests."

## D

**Where a Disability to Sue Occurs (Whether That Disability Arises Out of Inability, Imposed by a Superior Power, of the Plaintiff to Act, or Out of His Inability, Imposed by a Superior Power, to Reach the Defendant by Suit) the Statute of Limitations Does Not Run Until the Disability Is Removed, and It is Immaterial That Such Disability Is Not Specifically Excepted from the Operation of the Statute.**

A case resembling the case at bar in several respects is *Jackson v. Fidelity etc. Co.,* 75 Fed. 359. There the defendant had insured the fidelity and honesty of a national bank's president, cashier and bookkeeper. Thereafter these officers embezzled funds of the bank. The comptroller of the currency, by the bank examiner, took possession of the bank, and later, by action of the comptroller, a receiver was appointed. The comptroller, examiner and receiver, all had notice of the defalcations but did not know the specific details. The said officers of the bank, and others with them, constituting in all a

majority of the board of directors, were placed under arrest at the time the comptroller took charge of the bank, and the books of the bank were taken possession of by the prosecuting attorney. Later the receiver was discharged and the bank re-opened for business. The insurance contract provided that suit thereon must be brought within twelve months from the discovery of any defalcation. Suit was not brought until about eighteen months after the comptroller, examiner and receiver had notice, if not knowledge, of the embezzlements. The defendants demurred on the ground, among others, that the case was not commenced within time, and the lower Court sustained the demurrer. From that ruling the plaintiff sued out a writ of error. The Circuit Court of Appeals, Fifth Circuit, held that the statute was not running while the bank was in the hands of the government officers and that notice to them was not notice to the bank itself. It held further that the bank was not chargeable with notice through the guilty knowledge of the defaulting officers. The case is put upon the ground that inability to sue, so long as it exists, prevents the running of the statute, if such inability is imposed by a superior power. The Court said, at page 365:

> "The fact that a majority of the directors were arrested and placed in a position where they were powerless to protect the interests of the bank under the allegations of the declaration raises no presumption against them. They are presumed to be the innocent sufferers from the acts of the guilty president and cashier until the contrary appears, and the failure of the

> plaintiff to act at once is due to the fact that the United States attorney took and kept possession of the books and papers of the bank, to be used as evidence in a criminal cause. This delay is chargeable to the government. Justice requires that the case should be treated as one in which the running of the limitation was stopped by the conduct of the insurer itself, since the delay was the direct result of the evil conduct from which the insurer contracted to protect the insured."

That portion of the last sentence commencing with the word "since" is, we respectfully submit, too strong a statement. One member of the Court, Judge Pardee, thought so, and also thought that the receiver was the representative not only of the government but also of the bank, and that the statute, therefore, should be held to run after the receiver had notice of the thefts. With all respect to the majority of that Court, we believe that Judge Pardee was right in his position. But the implications necessarily involved in his dissenting opinion are fully as strong in support of the position we here take as the majority opinion. Indeed, we think them stronger. For he says, that if the conduct of the defendant has brought about "suspended animation of the corporation" and has thus prevented it from bringing suit, the statute does not run during such suspension of animation. We quote from page 366:

> "The contention of the plaintiff in error, which is indirectly, if not directly, sustained by the opinion of the court, is that because of the appointment of a receiver by the comptroller of the currency, August 14, 1893, who took posses-

> sion of the bank, its books and papers, and retained possession until May 21, 1894, the bank during that time was in a quasi state of suspension and incapacity, without agents through which to act, and unable to perform any corporate function. If this were true as a matter of law, it is difficult to see wherein it would affect the indemnity company, *unless, indeed, the indemnity company was chargeable with the suspended animation of the corporation.*"

So that in both the majority opinion and the minority opinion it is clearly stated that if the defendant is responsible for the "suspended animation of the corporation," the statute does not run in his favor during the period of such suspension. That is exactly the case made by the complaint here, and for all present purposes the defendants here admit that the Washington Company's life and activities were suspended, by their acts, from 1909 to 1915.

In *Greenwald v. Appell,* 17 Fed. 140, Judge McCrary says on the subject of suspension of the right to sue by the supervention of some superior power:

> "The old rule upon this subject was very strict, and many authorities have been cited which clearly hold that if the statute of limitations begins to run, nothing will stop its running except something that is expressly provided in the statute itself; and it was formerly held that even a state of war was not sufficient; that an injunction against the creditor from bringing a suit was not sufficient to suspend the statute, and that it continued to run notwithstanding these things. That rule will be found laid down in Angell & Ames on Limitations, and I think in some other standard authorities. But the more modern rule is otherwise. It has been set-

> tled now, by the decisions of the supreme court of the United States, that there are certain exceptions to the statute of limitations *other than those which are expressed in the statutes themselves.* The old rule has been qualified by later and better rulings, especially in the Supreme Court of the United States."

In the case before Judge McCrary the question was whether the running of the statute of limitations against a creditor's claim was suspended during the time that bankruptcy proceedings were pending against the debtor. Said the Court, after stating that the statute is suspended by the supervening of inability to sue, due to a superior power (p. 141):

> "I think this case falls within that doctrine. The right to sue was undoubtedly suspended during the pendency of proceedings in bankruptcy, and to say that the statute continued to run, would be to say that the plaintiff is deprived of his right to sue, without the slightest fault on his part."

To the same effect is *In re Eldridge,* 2 Hughes 256, 8 Fed. Cas. No. 4,331.

On this general subject the case of *United States v. Wiley,* 11 Wall. 508, 513, is a strong authority. The Court said in that case:

> "True, the *right* of a citizen to sue during the continuance of the war was suspended, while the *right* of the government remained unimpaired. *But it is the loss of the ability to sue rather than the loss of the right that stops the running of the statute.* The inability may arise from a suspension of right, or from the closing of the courts, *but whatever the original cause, the proximate and operative reason is that the*

> *claimant is deprived of the power to institute his suit.* Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, *if he has the power to sue.* Such reasonable time is therefore defined and allowed. *But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away.* In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have."

In *Braun v. Sauerwein,* 10 Wall. 218, 222, the running of the statute of limitations of Maryland was held to be suspended by the provisions of a federal statute, the Court saying:

> "But in *Hanger v. Abbott* [6 Wall. 532] it was ruled, after grave consideration, that the time during which the courts of the recently rebellious States were closed to the citizens of other States, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, *and this, though the statutes contain no such exception.* In other words, it was held that the statutes of limitations of the insurrectionary States were suspended, while the courts in those States were closed by the war. Similar decisions have been made in the State courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; *that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue.* It seems, therefore, to be established, that

> the running of a statute of limitation may be suspended by causes not mentioned in the statute itself."

In *Devereaux v. City of Brownsville,* 29 Fed. 742, 750-751, the facts were that the legislature of Tennessee had attempted to enable municipal corporations of the State to evade the payment of their debts in full, and to that end had enacted laws disincorporating said municipalities and creating in their place "taxing districts" which were authorized to pay one-half of the "old debts," which, it was declared, should be held a full discharge thereof. The courts held that these taxing districts were but the old corporations under a new name; that the said laws did not really effect a disincorporation, but only a change of name. But there was an hiatus between the disincorporating acts and the acts creating the taxing districts. And the question arose whether during that interval the statute of limitations ran against judgments obtained on the old debts prior to the disincorporation. Said the Court:

> "The next defense set up is that one of the judgments is barred by the statute of limitations, it having been more than 10 years from the date of the judgment to the suing out of this mandamus, although other like writs have issued in the meantime. If the time elapsed between the repeal of the charter and the reorganization into a 'taxing district,' during which there was no organization to be sued, be excluded, the 10 years have not expired, and the bar has not attached. We have no hesitation in holding that it should be excluded, precisely as the time occupied by our late war was excluded,

> and for precisely the same reason. If a state, with the deliberate and confessed purpose of doing that, repeals the charter of a municipal corporation to enable it to evade or avoid the writ of mandamus to enforce judgments against it, thereby disable the plaintiff from proceeding in the case, the time of disability should not be computed in the period of the statute of limitations. * * * *Hanger v. Abbott,* 6 Wall. 532; *U. S. v. Wiley,* 11 Wall. 508, 513,—where it was ruled that although the *right* to sue was unimpaired, the 'loss of the ability to sue, rather than the loss of the right, stops the running of the statute.' "

*Broadfoot v. City of Fayetteville,* 124 N. C. 478, 32 S. E. 804, is very similar in its facts to *Devereaux v. City of Brownsville,* and the same conclusion was arrived at by the Court regarding the running of the statute of limitations.

The statutes of Tennessee forbid suit against the State. The tax laws provide that property on which taxes are delinquent shall be sold to the State, and that later the State may re-sell it to private persons. In *Collier v. Goessling,* 160 Fed. 604, 611, it was held that the statute did not run against a suit charging the sale to the State to be void, so long as the State had title or a pretended title under the sale, but that the statute began to run when the sale from the State to the private person took place. The United States Circuit Court of Appeals, Sixth Circuit, speaking by Judge Lurton, said:

> "There was, therefore, no remedy of which the landowner could avail himself, whether in or out of possession, which would invalidate the tax sale and tax deed, so long as the equitable

> title was in the state, and the state would not suffer itself to be sued in such way as to conclude itself. To start the running of a statute of limitation *there must be someone capable of suing,* some one subject to be sued, and a tribunal open for such suits. [Citations.] The State's title did not pass out of the State and into one capable of being sued until the deed of the clerk of July 10, 1902, to appellee. That was less than three years before this bill was brought. This suit to invalidate appellee's tax title was therefore not barred by the limitation relied upon."

The principle that while there is no one who can sue, or that while the plaintiff is incapacitated by a superior power from suing (and these are but two different ways of expressing the same general rule) the statute does not run, has been more frequently applied in favor of the estates of deceased persons than in any other class of cases. Thus A has a contractual claim against B which matures at a day certain. Before that day A dies intestate and the claim matures before an administrator is appointed. The statute does not begin to run when the claim matures but when the administrator is appointed. Another instance: A dies intestate. B takes possession of his estate and converts it to his own use. Later an administrator is appointed. The statute does not run against B for the conversion from the time when he took the property, but only from the time when the administrator was appointed and qualified. The principle underlying both these cases applies to the case at bar. For while it has been frequently held that if the statute starts running be-

fore the death of A, in our illustrations just given, nothing happening thereafter will stop its running, yet even that restricted and narrow rule will not avail these defendants, for here the cause of action did not arise, the statute did not begin to run, *before* the disability was imposed upon the Washington Company by the defendants and their co-conspirators, but *after* that event.

Of *Stanford's Case* and *Cary v. Stephenson,* 2 Salkeld 421, referred to in *Murray v. East India Co.,* 5 B. & A. 204, 7 E. C. L. 118, Abbott, Ch. J., says in his judgment in the *Murray* case:

> "The first of these cases arose upon the statute of fines, 4 Hen. 7, c. 24; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term the grantee died; at the expiration of the first term, the lessor entered, and levied a fine *before administration granted,* and resolved, that the administrator should have five years, *for none had title to enter before.* The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate, *after his death, and before administration granted;* the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the Court was, that *the time of limitation did not begin to run until the grant of the administration.*"

And so in the *Murray* case, the Court held that under similar circumstances the statute did not begin to run on a claim accruing after the death of

the intestate, but before the appointment of the administrator, until the administrator was appointed.

In *White v. Blankenbeckler,* 115 Mo. App. 722, 92 S. W. 503, 504, A had died leaving personal property. B thereupon converted it to her own use. Held that time did not run in bar of an action for such conversion until a personal representative of A was appointed and qualified. The Court said:

> "* * * the statute is not put in operation by one taking possession of property left by a deceased party and claiming it as his own. It does not begin to run until an executor or administrator is appointed. *The general rule is, to set the statute in motion, there must be some one, at the time, having capacity to sue.* * * * Where there is no one to sue, laches cannot be imputed."

In *Stevenson v. Markley,* 72 N. J. E. 686, 695, 66 Atl. 185, 189, the suit was not brought until twenty-one years after the death of the party whose estate the plaintiff administrator represented. The plea of the statute was overruled, because the suit was brought very shortly after the administrator was appointed; the Court saying:

> "The authorities hold that, where the cause of action did not exist during the life of the party and came into existence subsequent to the party's death, the statute does not begin to run until the appointment of a representative. * * * The time between the death of the party and qualification of personal representative is not counted."

In *McAuliff v. Parker,* 10 Wash. 141, 146, 38 Pac.

744, is the following statement by Judge Dunbar, speaking for the Court:

> "The general holding of the courts is that the statute of limitations does not begin to run *until there is someone to sue* or liable to be sued. * * * For instance, in case the action arises after the death of a party to a contract, then the statute would not begin to run until an administrator or representative was appointed."

To the same effect as these cases are many others. Examples are:

> *Barton v. New Haven,* 74 Conn. 729, 52 Atl. 403, 405;
>
> *Griesel v. Jones,* 123 Mo. App. 45, 99 S. W. 769;
>
> *Root v. Lathrop,* 81 Conn. 169, 70 Atl. 614;
>
> *McPherson v. Swift,* 22 S. D. 165, 116 N. W. 76, 83.

We have referred to the rule followed by some courts that where the statute has once begun to run nothing happening thereafter will stop its running. But this is a rule which is perhaps more honored in the breach than in the observance. Certainly it is not universally followed. Thus, in *Alice E. Mining Co. v. Blanden,* 136 Fed. 252, 255, two promissory notes signed by Blanden matured nearly ten years before his death. The statutory period on such notes was ten years. Before suit was commenced against his representative the ten years expired, as to one note, if the interval between his death and the qualification of the representative was counted;

otherwise, the ten years had not expired. The Court said:

> "The statute of limitations does not, in terms, provide that the death of a debtor after a cause of action against him has accrued shall suspend the running thereof; and in support of the demurrer the rule is invoked that, when the period of limitations has once commenced to run, it will not be suspended, except where the statute itself so provides. That such is the general rule may be conceded, but there are exceptions to it. Statutes of limitations are based upon the presumption that one having a legal claim will not delay enforcing it beyond a reasonable time if he has the power to bring suit upon it. Such reasonable time is therefore fixed and allowed. But the basis of the presumption is gone whenever the right or ability to resort to the courts or to bring the action does not exist. In such cases the creditor has not the time within which to bring his suit that the statute has given him, and the time that he is so prevented from suing upon his claim will not be included in computing the period of limitation."

The condition of "suspended animation" to which the defendants and their co-conspirators reduced the Washington Company, and in which they kept it from 1909 to 1915, was very akin to duress, and during duress the statute does not run in favor of him who imposed it. In *Allen v. Leflore County,* 78 Miss. 671, 29 So. 161, where a wife had executed a deed to property in order to make good the alleged defalcations by her husband, an ex-county officer, from the county, and at the time of executing it she was laboring under duress induced by threats that her husband would be sent to the penitentiary un-

less his alleged shortages were made good, the Court held limitation against an action by her or her heirs to avoid the deed did not begin to run until the husband's death, since while he was alive the duress was still in force. To the same effect is *The Eureka Bank v. Bay,* 90 Kan. 506, 509, 135 Pac. 584.

In *Howard v. Carter*, 71 Kan. 85, 89-90, 80 Pac. 61, the facts were that an old man was alleged by the plaintiff, one of his heirs, after the old man's death, to have been of unsound mind and body and to have been unduly influenced to make deeds of all his property to two sons-in-law. The heir sued for cancellation of the deeds. The Court said (p. 63):

> "The allegation of the petition is 'that he was mentally weak at the time of the execution of the deeds,' and that this condition had existed for more than eight years prior to his death. Being so mentally weak and under the influence of the sons-in-law, the statute of limitations would not run against him in their favor."

*National Bank of Commerce v. Wade,* 84 Fed. 10, 15, was a case by a bank of Tacoma, Washington, against ex-directors for damages arising from the making of excessive loans, in violation of the national banking act, when they were in office. The case was in equity because of the complicated nature of the accounts to be examined. Judge Hanford said:

> "I hold that in cases of this nature the statute of limitations will not begin to run *so long as the cestui que trust is under the control or influence of the trustee* (2 Perry, Trusts, 3d

> ed., sec. 864, p. 512; 2 Pom. Eq. Jur., §1089), and as this suit was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations."

It will not do to say that the Washington Company was not subjected to a superior power by the defendants. In the nature of things the combined wrongful action of all its officers, directors and stockholders *is* superior power, for a corporation can act in no other way than by them (for action for a corporation by a receiver is not action *by* the corporation, but in its behalf). Add to the fact that the defendants naturally *would not* act in its behalf, the other fact that they turned the corporation over to another company which not only *would not* but *could not* act in its behalf or legally cause it to act, and consider the reasons for this "would not" and "could not"—the conspiracy, the unlawful and *ultra vires* "sale" of stock, the "consolidation"—and it is just as apparent that the Washington Company was subjected to a superior power as that the bank in the above mentioned case of *Jackson v. Fidelity etc. Co.,* 75 Fed. 359, was subjected to such superior power when its officers and directors ceased to act for it and it went into the hands of government officers, and its books and papers were taken possession of by the prosecuting attorney. Here also the company fell into alien hands, not friendly, helping hands, as in that case, but hostile, piratical hands. Here also the books and papers of the company fell into other hands than

those of its own representatives—first into the hands of the Nevada Company and then into the hands of the receiver for the Nevada Company. The fact that here the impotence, the "suspended animation," of the Washington Company was carefully and skilfully planned and designed by these defendants, does not make it less, but rather more, a case of "superior power" than where such suspension of animation was fortuitous, as in the said *Jackson* case. The fact that this suspended animation resulted from the acts of *all* its stockholders, directors and officers does not make it less a case of suspended animation through superior power than where it happens as a result of an act by a part only of its officers and directors, as in the *Jackson* case. The fact that it was brought about directly does not make it less such a case than where it comes about indirectly. As the Supreme Court of the United States said in *United States v. Wiley, supra,* "*whatever the original cause,* the proximate and operative reason [for the stopping of the running of the statute] is that the claimant is deprived of the *power* to institute his suit"; and as the same great Court said in *Braun v. Sauerwein, supra,* all these cases where the statute is held not to run "rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case"; and as Judge Pardee said in the said *Jackson* case, the statute will not run, *a fortiori,*

where the defendants themselves are "chargeable with the suspended animation of the corporation." That is this case.

### E

### Where Disability to Sue Has Been Caused by Him Against Whom the Cause of Action Exists, or Where by Any Conduct He Has Induced or Caused a Withholding or Postponement of Suit, He Is Estopped to Say that the Statute of Limitations Ran During the Time the Disability Existed or the Suit was Withheld.

The interpretation of the statute of limitations given by the Supreme Court of the State of Washington is, of course, of controlling effect in this case, since it is that statute which governs. U. S. Rev. St., sec. 721; *Leffingwell v. Warren,* 2 Black (U. S.) 599.

In *Kreielsheimer v. Gill,* 85 Wash. 175, 147 Pac. 871, the Supreme Court of Washington, in an opinion written by Judge Chadwick, applied the doctrine of equitable estoppel to the limitation period. The case held that where a promise is made to pay as soon as a suit against a person secondarily liable is over, regardless of the outcome of that suit, and a creditor is thereby caused to delay the enforcement of his claim, an equitable estoppel is created so that the primary debtor cannot claim that the statute of limitations was running against the debt while the creditor thus forbore to sue. The Court quoted approvingly from 25 Cyc. 1016, as follows:

> "The doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the statute of limitations, it

> being laid down as a general principle that when a defendant electing to set up the statute of limitations previously by deception or any violation of duty toward plaintiff, has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold."

Of the doctrine of equitable estoppel 16 Cyc. 682 says:

> "The term was borrowed originally from equity and hence denominated 'equitable estoppel.' Equitable estoppels are so called not, however, because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. The doctrine is recognized in the courts of common law just as much as in courts of equity, although it was at first administered as a branch of equity jurisprudence."

In another Washington case, namely, *Marshall-Wells Hardware Co. v. Title etc. Co.,* 89 Wash. 404, 409, 154 Pac. 801, 803, an action at law on a bond, the Court said:

> "It is no doubt the rule that, where a fraud, or circumstances amounting to a fraud, prevents a party from maintaining an action against another, the equitable rule of estoppel will apply. The authorities are abundant to that effect."

It is the general rule that where one has prevented the bringing of suit against himself, whether by duress or a controlling influence over the plaintiff or by any means that would make it unfair and

unjust for him to say that the statute had run, he will be held estopped to set up the statute of limitations.

*Voorheis v. People's Mut. Benefit Society,* 91 Mich. 469, 474, 51 N. W. 1109;
*Armstrong v. Levan,* 109 Pa. St. 177, 1 Atl. 204;
*Renackowsky v. Board of Water Com'rs.,* 122 Mich. 613, 81 N. W. 581;
*Howard v. Carter,* 71 Kan. 85, 80 Pac. 61;
*Jenkins v. Jenkins,* 94 Kan. 263, 146 Pac. 414;
*Coxe v. Huntsville Gas Light Co.,* 106 Ala. 373, 17 So. 626;
*Klumpp v. Thomas,* 162 Fed. 853.

*Treasurer of Brown Co. v. Martin,* 50 Oh. St. 197, 203, 205, 33 N. E. 1112, 1113, 1114, was a suit to enforce the payment of an assessment levied to pay for a public improvement. The owner of the land had, by a prior action, restrained the collection of the assessment. The question was whether time ran while the injunction was in force. The Court said:

> " * * * the question is whether or not a party may be permitted to set up the bar of the statute of limitations as a defense to an action the commencement of which he has wrongfully procured to be restrained until sufficient time has elapsed to render such a defense available at law. * * * It seems reasonable to conclude that it would be against conscience for a party to maintain a plea of the statute against an adversary, who, *by his procurement,* has been enjoined from prosecuting his suit. * * * No man should be permitted to

> take advantage of his own wrong. * * * The delay complained of *was the result of the wrongful act of the defendant himself,* for which the plaintiff was in no way responsible, and it now comes with an ill grace for the unsuccessful party in that litigation to insist that the observance by plaintiff of that order of injunction and his obedience to it, shall work a defeat of his right of action because of such delay."

In *Hayes v. Kenyon,* 7 R. I. 136, 141, hereinbefore referred to, where the president of a bank had sold it out, as these defendants sold out the Washington Company, to an irresponsible set of men for a large bonus, the receiver recovered judgment against the President; the Court saying:

> "One would think, especially if this was done without authority even formally legal, that it was a wrong for which the bank itself might have redress, if it was ever rescued from the hands into which it had fallen so as to be able to seek it, and that the plaintiff might maintain this action as representing the corporation only."

We submit that from the foregoing principles and authorities the conclusion is inevitable that time did not run against the Washington Company until 1915. Those principles, applied to the facts of this case, are: (1) The defendants, in the transactions of September, 1909, and subsequently, were acting (a) in their own *private interest,* and (b) *adversely* to the interest of the Washington Company, and until 1915 the company did not fall into the care of any one who *could,* in its behalf, take notice of or know

either those acts or their fraudulent, adverse character; and *because of the relation of principal and agent* existing between the corporation and the defendants, and the latter being the only source from, by and through whom, before 1915, it *could* have gotten or be charged with notice or knowledge of this cause of action, the statute did not run so long as that condition continued; and (2) by reason of the corporation being deprived of any one who would or could speak or act in its behalf and of being thrown into the hands of another company for the very purpose of being robbed and rendered impotent by the latter, which purpose was actually accomplished, the Washington Company *was disabled by a superior power* from suing on this cause of action until 1915, and whether such disability had been brought about by the defendants or not the statute would not have run until the disability was removed in 1915; and (3) the disability *having been brought about by the defendants themselves, they are estopped* to say that time ran before the disability was removed in 1915. These three principles may be respectively termed briefly, (1) suppression of knowledge by agent, (2) subjection to superior force, (3) prevention of action by the defendants themselves. Under each one of these principles, independently of the other two, the statute did not run until a receiver for the Washington Company was appointed in 1915.

And, in our view, the statute began to run from the time the receiver was appointed in Washington,

not from the time that he was appointed in Alaska; that is, in September, 1915, not in May, 1915. (See tr. pp. 42-45.) Washington is the domiciliary State of the Washington Company; and the principle of the case of *Pacific Coast Coal Co. v. Esary,* 85 Wash. 448, 148 Pac. 579, seems to be that no action could be brought in that State for the recovery of the general property of the corporation or on the choses in action belonging to the corporation generally, as distinguished from property and choses in Alaska, by the receiver appointed in Alaska. Therefore, under the foregoing principle that time does not run until there is some one who can sue, the statute did not run until the receiver was appointed in Washington. *Hobart v. Connecticut Turnpike Co.,* 15 Conn. 145, 148, is a case in point. A testatrix died in *New York* in 1822, owning stock in a turnpike company in *Connecticut;* her will was probated and her executors qualified in New York soon after her death. Nineteen years later, in 1840, administration was granted on her estate in Connecticut, and an administrator *cum testamento annexo* appointed. To an action brought by this administrator appointed in Connecticut against the turnpike company to recover dividends declared between 1826 and 1834 the defendant company pleaded the statute of limitations of six years; and it was held that the statute began to run against the claim only from the granting of administration in Connecticut, and that, consequently, the claim was not barred. The Court said:

"The dividends for which this suit is brought, it will be observed, accrued to Mrs. Startin's estate after her decease, and before her will had been proved [in Connecticut] or administration taken on her estate [in Connecticut]; and more than six years previous to the commencement of this suit. But administration was not taken on her estate [in Connecticut] till 1840, much less than six years previous to the commencement of the suit. And the question is, whether the plaintiff's claim is barred, by the statute of limitations. And this depends upon the answer to another question, namely, when did the statute begin to run against this claim? Was it when the dividends accrued, or when administration was granted on her estate? And this precise question was decided, in the case of *Murray v. East India Company,* 5 B. & A. 204 (7 E. C. L. 70) in which Abbott, Ch. J., in giving the unanimous opinion of the court of King's Bench, after referring to the authorities and coming to the conclusion that they sustained the claim of the plaintiff, that the statute did not begin to run till the granting of administration, says: 'Now, independently of authority, we think it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing.'

"That case was twice argued in the court of King's Bench, and the question settled, upon great deliberation. We believe it to have been correctly settled."

Though, under the foregoing authorities and the facts set out in the complaint and the conclusions which we think must be drawn from such authorities and facts, we deem it immaterial which section of the Washington statute governs this case, since the action is well within time whichever section applies, yet we will consider the statute, for it clearly

supplies a *fourth* distinct and independent ground for holding that time did not begin to run until 1915.

## F

## The Acts Described in the Complaint Were a Palpable Fraud on the Washington Company and the Statute Applicable to This Case Is the Fourth Subdivision of Section 159 of the Washington Code.

The estoppel which we have shown to preclude the defendants from claiming that time ran against the Washington Company on this cause of action, is independent of the provisions of the fourth subdivision of section 159 of the Washington Code. That the two are distinct cases of estoppel, each independent of the other, may be seen from an illustration: If A has a cause of action against B on a promissory note, and B, to keep A from suing, locks A up until the statute has run, B is estopped to set up the statute when the suit is afterwards commenced. Such a case, however, would not fall under sec. 159, subd. 4, which reads:

> "§159. Within three years,—
>
> * * *
>
> "4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

So we say that, regardless of whether this case falls under sec. 159, subd. 4, the defendants are estopped from claiming that the statute ran before 1915, by reason of the fact that their acts amounted

to a physical prevention by superior power which kept the company from suing before that time.

If the corporation had possessed a mind independent of its stockholders, directors and officers, then the fact that the acts of the conspirators in September, 1909, and subsequently, were in the private interest of the conspirators and adverse to the Washington Company would naturally, through such supposed other mind, have been known to the company. But possessing no such other mind, that fact could not be known to the corporation. Therefore, *in the nature of things,* those acts and facts remained hidden and concealed, and were not discovered "by the aggrieved party," the corporation, until 1915 when the receiver was appointed.

Here we must notice briefly the mistake made by the lower Court in assuming that Mr. Noyes, as receiver of the Nevada Company, could have brought this action, or that any knowledge which Mr. Noyes, as the receiver of the Nevada Company or personally, may have had in some way affected and bound the Washington Company *before* he was appointed receiver of the latter company. Surely the fallacy of such a proposition is outstanding. The Court said (tr. p. 71):

> "But in the instant case the facts were known * * *. In fact, the complaint sets out the transactions at hand, all of which appear to have been in the possession of the plaintiff more than three years prior to the commencement of this action * * *."

Even if Mr. Noyes had known the facts in 1911,

how would that affect the rights of the Washington Company, or its receiver, in this action? He was not *its* receiver until 1915. It had no receiver until 1915. Until 1915 Mr. Noyes was as much an "outsider" as any "man in the street," so far as his right to enforce this cause of action or any other in behalf of the Washington Company was concerned. The Court says the facts were "in the possession of the plaintiff more than three years." Who *is* the plaintiff? The title of this case shows him to be "F. G. Noyes, *as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington.*" Now, the complaint shows that in Alaska that person came into existence in May, 1915, and that in Washington he came into existence in September, 1915. (See tr. pp. 42-45.) Suppose that after acquiring knowledge in the spring of 1915 (tr. p. 41) there had been no consolidation, and without being appointed receiver of the Washington Company, Mr. Noyes, who was then the receiver in Alaska of the Nevada Company, had brought an action against these defendants and in behalf of the Washington Company upon exactly the same cause of action as is stated in this complaint, how promptly the defendants would have demurred to the complaint under the provisions of section 259 of Remington & Ballinger's Annotated Codes and Statutes of Washington, which provides, "The defendant may demur to the complaint when it shall appear upon the face thereof * * * (2) That the plaintiff has no legal capacity to sue;" and

how certainly, and correctly, too, the lower Court would have sustained the demurrer on that ground.

This is plainly an action "for relief upon the ground of fraud," within the terms of sec. 159, subd. 4. The complaint shows that the defendants intended to and did turn the Washington Company over to the Nevada Company, and that thus the Nevada Company was by the defendants given access to the Washington Company's money and property; that the defendants at that time knew the Nevada Company to be grossly insolvent; that the natural and probable result followed—the Washington Company was robbed—its assets were converted by the Nevada Company; that the transaction was carried out by means of a "sale" of stock,—unlawful and known to the defendants to be unlawful because intended to violate, and actually violating the Sherman Law,—null and void and known to the defendants to be null and void because forbidden (a) by the general rule of common law prohibiting one bank from buying the stock of another, and (b) by the express prohibition in the charter of the Nevada Company; that the scheme was further carried out and designedly protected and screened from detection by a pretended consolidation, unlawful because not permitted by the charters of the companies involved, and really not attempted in good faith to be effected, though pretended to the public and to the banks' customers to be effected; that the scheme and its successful accomplishment were further designedly protected and screened from detection by

a fraudulent change of name of the Nevada Company, made at the very moment of the "consolidation," by which it ceased to use the name "Fairbanks Banking Company" and took the name of the Washington Company, "Washington-Alaska Bank." All of these facts taken together proclaim in trumpet tones that this action is "for relief upon the ground of fraud," and bring it within the spirit and very letter of section 159, subdivision 4.

This case, therefore, comes within sec. 159, subd. 4, for the same reason and in the same way that *Stearns v. Hochbrunn,* 24 Wash. 206, 64 Pac. 165, came within it. In that case it was held that where an agent converted money properly belonging to his principal and resorted to subterfuges to conceal that fact, the action of the plaintiff was properly in damages for the fraudulent conversion and fell within said section and subdivision.

In *Pondir v. New York L. E. & W. R. Co.,* 72 Hun. 384, 389, 25 N. Y. Supp. 560, 562, the Court said of a transaction by which one corporation, owning nearly all the stock of another corporation, took a lease for 499 years on the latter's property, paying therefor only taxes and interest on the latter's debts:

> "This was effected through the compliant board of directors of the Buffalo, Bradford and Pittsburgh Railroad Company, elected and controlled by the Erie Railway Company, which held a majority of the stock of the Buffalo, Bradford and Pittsburgh Railroad Company. By this means the last-mentioned corporation was stripped of all of its property * * * and for the use of which nothing will be paid for

> 499 years, except taxes assessed on its property and the interest on its debt. This renders all of the shares not held by the Erie Railway Company practically valueless, and that such was the intended effect is apparent from the transactions. *This was a fraud* on the Buffalo, Bradford and Pittsburgh Railroad Company * * *."

It is clear from statements made by the Lords Justice in the case of *Metropolitan Bank v. Heiron,* 5 Exch. Div. 319, that, in their opinion, the statute would not run against a corporation in favor of a director if the other directors, who knew of the transaction, participated in or winked at the fraud. There the liquidator of the company sued one of the directors for 250 pounds sterling received by him from a debtor of the company as a bribe for using his influence with the board to permit the debtor to compromise the debt at a very low figure. But the other directors at a regular board meeting had been fully apprised of the whole matter by the debtor and had evidently disbelieved the story, for they took no action. At least, it was not charged that the other directors were implicated in the fraud. Lord Justice James said:

> "I think, therefore, that the statute of limitations in this case began to run from the time at which the company discovered the fact, and the company must be held to have discovered the fact at the time when the person who is said to have paid the bribe went to the board of directors and told them the circumstances of the case. The fact that the directors investigated it and came to the conclusion that it was not true, does not at all help the company, unless they *allege and prove that the directors became*

> *accomplices in the fraud* and added to the original fraud by a gross neglect of duty on their part. There is no suggestion of that kind."

And Lord Justice Cotton, speaking of the innocent directors and of the charge made by the debtor against the bribed director, said:

> "There is no suggestion that they, *for any purpose of their own or in fraud of the company* abstained from investigating it."

A case directly in point on the proposition that a cause of action arising out of a secret, underhand violation of the Sherman Act is "for relief upon the ground of fraud," is *American Tobacco Co. v. People's Tobacco Co.,* 504 Fed. 58. The only question involved on the writ of error was the statute of limitations. The American Tobacco Company, another company and an individual had conspired against the People's Tobacco Company, in violation of the Sherman Law, and the latter company sued them under section 7 of that law. The Court said (pp. 60, 61):

> "The contention here, on the part of the People's Tobacco Company, as we understand it, is that the combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was concealed by the latter companies, or, at least, that their business operations and their methods were of such character that they concealed themselves, and that such concealment would prevent the running of the statute.
>
> * * *
>
> "The view of the Court, as indicated by the charge, was that prescription did not begin to

run until the People's Tobacco Company knew, or ought to have known, of the agreement or arrangement called 'a combination or conspiracy' on the part of the other tobacco companies against it."

The Court then quotes with approval from *Bailey v. Glover,* 21 Wall. 342, and continues (p. 62):

"It must be borne in mind that the course of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, *and this conduct and this concealment must necessarily be considered as a fraud on the plaintiff.* The court, in its charge, evidently assumed that, if the jury had found that the plaintiff was not entitled to damages, it would be unnecessary for it to consider the question of prescription at all. Indeed, such is indicated in the charge itself. But if it found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found *such conduct on the part of the defendants as would amount to a fraud* on the plaintiff, and all it was then necessary for it to consider was when the plaintiff first ascertained *the facts which formed the basis for the charge of fraud.*"

We deem this case of *American Tobacco Co. v. People's Tobacco Co.* an unimpeachable authority to the effect that the conduct of the defendants in the case at bar gave rise to "an action for relief upon the ground of fraud," within the meaning of the section and subdivision of the statute of limitations which we are now considering.

The term "conspiracy" is hard to define. The term "fraud" is hard to define. They are not identical or synonymous in all cases. Not all conspir-

acies, it may be, are frauds. But we respectfully submit that it is impossible to think of a conspiracy that is not a fraud where the following are the facts: Where two or more persons secretly conspire for the purpose of injuring "the business or property" of a third person, in pursuance of which conspiracy overt acts are committed in secret and devious ways, which overt acts actually do injure such third person. And that is this case, as alleged in the complaint herein.

## G

### The Action Being in Right of the Corporation No Discovery of the Facts by the Corporation's Creditors Could, in Itself, Have Started the Statute Running.

It may be objected that the fraud might have been discovered by others than the corporation itself and that they might have started suit to bring about relief to the Washington Company. To that we answer: (1) That is exactly what did occur; (2) that if others had not so discovered the fraud the defendants could not object because they intended and tried, successfully until 1915, to mislead the depositors and creditors of the Washington Company, and the public generally, into believing that there *was* no Washington Company left to be rescued—that it had been consolidated with the Nevada Company (tr. pp. 38-42); and (3) that it is immaterial, so far as the right of action of the Washington Company against these defendants is concerned, whether the Washington Company's *creditors* discovered the fraud of the defendants or not, because this is not

a suit in right of the creditors, but of the corporation alone, and the discovery by the creditors of the right of action, while most fortunate for the corporation and the creditors themselves, neither started nor could start the statute running. It was not till a *representative* of the corporation had knowledge or notice of the facts that the statute could begin to run, for not till then was knowledge or notice brought home to the corporation. For the reasons heretofore dwelt upon, the knowledge of the defendants was not the knowledge or notice of the Washington Company. The creditors are not representatives of the corporation. The receiver is. Therefore, not till there was a receiver of the Washington Company, himself having such knowledge or notice, was such knowledge or notice brought home to the corporation.

How could the appointment of a receiver be brought about? By the defendants? Vain hope! By their co-conspirators? Equally vain. By action of the domiciliary State, Washington? It had no practical interest in a corporation which, though organized under its laws, never did business within its boundaries, but operated exclusively two thousand miles distant, and moreover the State had and could have no knowledge upon which to act. There was but one hope; namely, that some creditor of the Washington Company would discover the fact that said company was never consolidated with the Nevada Company, and, therefore, still persisted as a corporation with assets to be administered. If

such administration could be had the causes of action belonging to the company could be enforced. But, as the complaint charges, the defendants had deliberately misled the creditors. That was part and parcel of the defendants' scheme. Otherwise they might have been tripped up in carrying out their plans. So it was only by an accident, by some fortuitous occurrence, that the discovery by a creditor could be made. The complaint sets out how that came about. It is set out, with other facts, for the purpose of showing how it happened that a representative *was* finally appointed who had knowledge or notice "of the facts constituting the fraud," —how the discovery of those facts was finally made on behalf of the corporation. Dilatoriness by the creditors, after learning the real situation, would not have affected the corporation or its right of action in any way, since this action is wholly in right of the corporation. But were the law otherwise, the complaint shows vigorous action by creditors the instant they learned the situation.

Therefore, on this point we adopt the position of counsel for the defendants, taken by them in the lower Court, for we say, with them, that the knowledge of any creditor is immaterial. We say further that the only question which is material is, When was the corporation or some one representing it first able to bring this suit? And the answer obviously is, Not till there came into being some person or functionary, apart from the defendants, to represent the corporation. In the circumstances of this cor-

poration that is equivalent to saying, Not till a receiver was appointed for it. And as Mr. Noyes, at the time of his appointment, though obtained only shortly prior thereto (tr. p. 41), had knowledge of the conspiracy and all the hitherto concealed and undiscovered facts relating thereto, his personal knowledge became on the instant of his appointment the knowledge of the receiver of the Washington Company, and from that date, and that only, the statute began to run.

## H

### Fraud Which Conceals Itself Prevents the Running of the Statute of Limitations Just as Effectually as Fraud Which the Defendant Actively Conceals.

We have demonstrated, we think, in connection with topics previously discussed, that, the defendants having acted in their own interest and adversely to the corporation and the corporation therefore having had no one through whom it could have or receive knowledge or notice, the corporation could not and did not have such knowledge or notice till a receiver for it was appointed in 1915. We have also shown that the conduct of the defendants, as alleged in the complaint, was, under the authorities, a fraud. Therefore, in the nature of things, the said fraud remained concealed from the corporation till said receiver was appointed. But more than that, the complaint distinctly alleges, as already stated herein, that the defendants purposely screened the real nature of their acts by clothing them in the forms of law—a sale, a consolidation, etc.—for the

very purpose of preventing detection by the only persons by or through whom, in the circumstances, relief for the corporation could possibly be initiated. Therefore the complaint makes out a case not only of fraud, the nature of which concealed it, but also of fraud designedly concealed from the creditors, through whom alone relief was, as a practical fact, to be expected.

The authorities, both in numbers and respectability, are overwhelming, that fraud which conceals itself prevents the running of statutes of limitation, both in equity cases and in actions at law, no less than that fraud which the defendant actively concealed. The statute does not run until the fraud is discovered.

> *Bailey v. Glover,* 21 Wall. 342, 347-349;
> *Martin v. Smith,* Fed. Cas. No. 9,164;
> *Carr v. Hilton,* Fed. Cas. No. 2,436;
> *Bartles v. Gibson,* 17 Fed. 293, 299;
> *Cook v. Sherman,* 20 Fed. 167, 171, 172;
> *Duff v. First Nat'l. Bank,* 13 Fed. 65;
> *Snodgrass v. Bank of Decatur,* 25 Ala. 161;
> *First Mass. Turnpike Co. v. Field,* 3 Mass. 201;
> *McMullen v. Winfield Bldg. & Loan Ass'n.,* 64 Kan. 298, 67 Pac. 892, 894;
> *Moore v. Waco Bldg. Ass'n.,* 19 Tex. Civ. App. 68, 45 S. W. 974;
> *Booth v. Lord Warrington,* 4 Brown's Parliamentary Cases 163;
> *Rolfe v. Gregory,* 4 DeGex, J. & S. 576;

*South Sea Co. v. Wymondsell,* 3 Peer Williams 143;
*Hovenden v. Lord Annesley,* 2 Schoales & Lefroy 634;
2 Pomeroy's Eq. Jur., §917, note 2;
Story, Eq. Jur., §1521;
Kerr, Fraud & Mistakes (4th ed.), p. 346.

And see:

*Northwestern Lumber Co. v. Aberdeen,* 35 Wash. 636, 639, 77 Pac. 1063;
*New York etc. Co. v. Tacoma,* 30 Wash. 661, 71 Pac. 194;
*Bidwell v. Tacoma,* 26 Wash. 518, 67 Pac. 259;
*Potter v. New Whatcom,* 20 Wash. 589, 56 Pac. 394.

In *Bailey v. Glover,* 21 Wall. 342, 347-349, the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

> "In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.
>
> "We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered,* though there be no special circumstances or efforts on the part of

the party committing the fraud to conceal it from the knowledge of the other party.

"* * * we are of opinion * * * that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule *to suits at law* as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent fraud. * * * To hold that by concealing a fraud, or by committing a fraud, in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried *on the common law side* of the court's calendar as to those on the equity side.

"* * * we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself,* the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him."

Pomeroy, says (§917, note 2):

"It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean that the defrauded party must *necessarily* have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence; nor that the fraudulent party must *necessarily* have used some affirma-

tive means to cover up his acts; nor that any *special* duty, such as a trust or fiduciary relation, must rest upon the fraudulent party, different from that which rests upon all such wrong-doers to speak the truth. It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based." (Italics are author's.)

## I

## Matter of Foreign Law Is Matter of Fact

Since it was only through the creditors that relief could be set on foot, it is to be observed that they were not only *actually* deceived, as the complaint alleges, by the representations made by the defendants, but also that the information which would have undeceived the creditors naturally concealed itself. That information was matter of foreign law—the laws of Nevada which would have made it clear that there could have been no consolidation. We say it naturally concealed itself, for surely it is not reasonable to expect that depositors or creditors of the Washington Company should look up the laws of the Nevada Company's domicile, a foreign state, to find out what the latter company's powers were. Assuming, for the sake of the argument, that the depositors were charged with notice of the powers of the Washington Company so far as related to their

transactions with it, to-wit, doing their banking with it, they were not chargeable with notice of the powers of the Nevada Company. It would be most unnatural of them to look up the laws of Nevada. It is not to be exacted or even expected of them. Those laws were matters which would naturally remain unknown to them, and therefore the Court would not hold them chargeable with notice thereof. So far as they bore upon the creditors' rights against the Washington Company, those laws were *facts* which naturally concealed themselves. The central question which affected the creditors' rights was whether or not the Washington Company had been consolidated with the Nevada Company. If it had been, the administration under the Nevada Company's receiver was conserving and protecting the rights of those who had been creditors of the Washington Company. If there had been no consolidation, the rights of the Washington Company's creditors were not being protected. Whether there had been such consolidation depended upon (a) the existence of laws in the domiciliary States of the corporations, Washington and Nevada, authorizing such consolidation, and (b) proceedings by the corporations and their stockholders in conformity with such laws. The defendants represented to the creditors of the Washington Company, both by conduct and by declarations, that there were such laws and that such proceedings had been had. In the nature of things, one of these matters being the private proceedings of the defendants themselves and their co-

conspirators, and the other being a matter of fact which said creditors could not be charged with knowing, the creditors could not know the untruthfulness of the representations. The creditors were residents of Alaska and all of their business transactions with the Washington Company occurred there. To them Washington and Nevada were foreign States.

The lower Court seems to have thought that as regards the creditors of the Washington Company the matters of Nevada law and Washington law were matters of law, not of fact, for it said (tr. p. 71):

> "The allegations of the complaint to avoid the bar are not the want of knowledge of the facts but rather want of legal information upon the facts. * * * In fact, the complaint sets out the transactions at hand, all of which appear to have been in the possession of the plaintiff more than three years prior to the commencement of this action, but seeks to toll the statute because he was not advised of the legal status of the known facts."

Disregarding the obvious error already referred to hereinbefore, viz., of assuming that the knowledge of Mr. Noyes in his private capacity or as receiver of the Nevada Company could be imputed to the Washington Company, before he was appointed receiver of the latter company, we confine our attention to the error which the Court commits of considering matters of foreign law to be matters of law, not of fact. It is too well established to be ques-

tioned at this late day that matters of foreign law are matters of fact.

*Haven v. Foster,* 9 Pick. (Mass.) 112, 129, 19 Am. Dec. 353, 359;
*Bank of Chillicothe v. Dodge,* 8 Barb. (N. Y.) 233;
*Ellison v. Branstrator,* 153 Ind. 146, 54 N. E. 433;
*Norton v. Marden,* 3 Shepley (Me.) 45;
*Patterson v. Bloomer,* 35 Conn. 57, 95 Am. Dec. 218;
*Leslie v. Baillie,* 2 Younge & C. Ch. 91;
*McCormick v. Garnett,* 5 DeGex, M. & G. 278;
2 Pomeroy's Eq. Jur., §839;
1 Story, Eq. Jur. (10th ed.), §140.

And see:

*Merchants' Bank v. Spalding,* 12 Barb. (N. Y.) 302; Affd. 9 N. Y. 53;
California Civil Code, §1579;
New York Civil Code, §764.

The case of *Haven v. Foster, supra,* is one of the clearest on this subject. An intestate, resident in Massachusetts, died leaving certain property in New York. He had four relatives living in Massachusetts. If the property were distributed according to the laws of Massachusetts each of those relatives was entitled to one-quarter, but if according to the laws of New York, of which they were all ignorant, one of the four was entitled to one-half and the other three to one-sixth each. The property was distrib-

uted according to the laws of *Massachusetts.* Thereafter the one entitled to one-fourth learned of the provision of the New York law and sued one of the other distributees for the recovery of the difference between one-quarter and one-sixth. The Court said (9 Pick. 129):

> "The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.
>
> "It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim: *Ignorantia juris quod quisque tenetur scire, neminem excusat.*
>
> * * *
>
> "The misapprehension or ignorance of the parties to this suit, related to a statute of the State of New York. Is this, in the present question, to be considered *fact* or *law?*
>
> "The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. * * * If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. * * * The laws of other states in the Union are in these respects foreign laws. * * * The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. * * *
>
> "That the *lex loci rei sitae* must govern the descent of real estate, is a principle of our law, with which every one is presumed to be ac-

quainted. But what the *lex loci* is, the Court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the Court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus,* and does not extend to foreign laws or the statutes of other states.

"We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a *fact.*"

In *Bank of Chillicothe v. Dodge,* the Court said (8 Barb. 233):

> "Ignorance of the law of a foreign government is ignorance of fact—and in this respect the statute laws of other states of this Union are foreign laws."

And it is also well settled that to be ignorant or remain ignorant of foreign law is not negligence, no matter how long that ignorance continues. In *Haven v. Foster,* quoted from above, the Court used this language (9 Pick. 128):

> "It is in the first place objected, that the plaintiff's ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be

> presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve. In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. *But this doctrine does not apply to the present case.* It was not the duty of the plaintiff to know the laws of New York, *nor does ignorance of them imply negligence.*"

But, as we have already stated, this action being in right of the Washington Company, not in right of its creditors, the vital question is not whether or when the creditors acquired notice or knowledge of the fraud, *but when the corporation acquired such notice or knowledge,* and in the nature of things that could not be till a receiver was appointed for it.

## SUMMARY

The statute of limitations did not run against this cause of action until Mr. Noyes was appointed receiver in the State of Washington in 1915 because: (1) Mr. Noyes as receiver of the Nevada Company was not receiver of the Washington Company, and his knowledge as receiver of the Nevada Company did not in any way affect or bind the Washington Company as to this or any other cause of action by or in behalf of the Washington Company; (2) all of the defendants, being all of the stockholders, directors and officers of the Washington Company, joined in the conspiracy, and thus the Washington Company was left without any one by or through

whom it could have knowledge or notice of the conspiracy, and so long as that condition continued, that is, until the corporation could acquire such knowledge or notice, or some one in its behalf could acquire it, the statute did not run; (3) the conduct of the defendants and their fellow-conspirators amounted to prevention of suit by a superior power, and as long as such prevention continued the statute did not run; (4) that prevention having been by the defendants themselves, the principle of estoppel prohibits them from asserting that time ran against the corporation while the prevention continued; (5) the whole transaction of September, 1909, and later, was a fraud on the Washington Company, and that fraud was, until 1915, concealed by its very nature and by the very circumstances of the case from the Washington Company, in which alone the right of action existed; and the appointment of the receiver in the latter year affected the Washington Company, for the first time, with knowledge of the fraud; but if the right of action had been in the creditors of the Washington Company (as it was not), the fraud was concealed from them not only by its very nature but by the active and affirmative misrepresentations of the defendants and their co-conspirators, so that negligence cannot be imputed to them for failing to discover the fraud prior to 1915. Till 1915 there was no one who could sue. Till 1915 the fraud was not discovered.

We respectfully submit, therefore, that the Dis-

trict Court erred in sustaining the demurrer and in dismissing the action. The complaint states a cause of action against the defendants, and the action was commenced within time.

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